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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1926

No. 362

LIGGETT & MYERS TOBACCO COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 3, 1926

CERTIORARI GRANTED OCTOBER 11, 1926

(31,893)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 1170

LIGGETT & MYERS TOBACCO COMPANY, Petitioner,

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the Court of Claims

To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States :

Your petitioner, Liggett & Myers Tobacco Company, respectfully prays for a writ of certiorari to review the judgment of the Court of Claims of the United States in the case of Liggett & Myers Tobacco Company v. United States, No. D-549 (decided February 15, 1926, R. 40), under Section 240 of the Judicial Code, as amended by the Act of Congress approved February 13, 1925.

QUESTION INVOLVED

Is the petitioner entitled to interest as a part of the measure of just compensation for private property taken by the United States for public use under the Acts of Congress approved March 4, 1917 (39 Stat. 1193) and June 15, 1917 (40 Stat. 182) ?

STATEMENT OF THE CASE

Petitioner sued in the Court of Claims to recover "the sum of \$59,610.34, together with just compensation or damages for the detention thereof" (R. 10), on account of the taking by mandatory orders of the Navy Department of tobacco and tobacco products, the property of petitioner, for which only partial payment had been made by the United States.

The Court of Claims, on February 15, 1926, entered judgment for the petitioner in the amount of \$59,610.34

(R. 40), the balance due and unpaid on the "fair market value" of the property requisitioned as aforesaid, but re-value" of the property requisitioned as aforesaid, but refused to allow interest on said amount, basing its refusal upon Section 177 of the Judicial Code of the United States (R. 39).

The tobacco and tobacco products for which just compensation is claimed by your petitioner were requisitioned by a mandatory order of the Navy Department, No. N-4128, dated August 26, 1918 (R. 11), and modifications thereof dated September 9, 1918 (R. 15), October 14, 1918 (R. 18), and November 22, 1918 (R. 20).

The above-mentioned order stated on its face that it was issued "pursuant to the provisions of the Acts of Congress, Naval Appropriation Act approved March 4, 1917, and the Urgent Deficiency Act approved June 15, 1917 (quoted in part on reverse hereof), and acting under the direction of the President of the United States, * * * Compliance with this order is obligatory, and no commercial orders will be allowed by you to interfere with the delivery herein provided for."

The order further provided that it "must be accepted and filled in any event and * * *. If order is placed under subparagraph (b), original is to be signed and returned." The order, by its express terms, was placed "under the conditions stated in subparagraph (b) (subparagraph (a)) is eliminated;" but later, when your petitioner refused to accept the prices fixed by the Navy Department, said Department attempted to modify the order "to apply under the terms and conditions of subparagraph A thereon, subparagraph B being eliminated" (R. 24).

During the period September 9, 1918 to January 23, 1919, your petitioner delivered to the Navy and Marine Corps at the times and places specified in said order and modifications thereof, tobacco and tobacco products in the amounts and quantities set forth at pages 22 and 23 of the Record, invoicing the same at five per centum less than the prevailing market prices paid to the claimant in an open and free market for precisely similar products of the same brands, and in similar quantities, by wholesale dealers in said products at the same time and place of delivery, the total invoice price being \$483,504. 30 (R. 23).

From time to time, between September 9, 1918 and November 23, 1918, petitioner was paid on account of said deliveries, amounts totaling \$423,893.96 (R., 34), leaving a balance due petitioner of \$59,610.34 (R., 34).

On or about December 4, 1920 the Navy Department notified petitioner that "the Navy has established * * * final prices for tobacco required under Navy Orders N-4128," which prices were lower than the amounts claimed by petitioner (R., 34).

Petitioner rejected and declined to accept as just compensation the prices set forth in the letter of the Navy Department of December 4, 1920 and so notified said Department on December 7, 1920 (R., 35).

Repeated appeals to the Navy Department for just and complete compensation for the materials requisitioned as aforesaid having been rejected by said Department, petitioner on August 4, 1924 filed its suit in the Court of Claims for the balance due it, with interest thereon (R., 1). The case was submitted January 26, 1926, on an agreed statement of facts, the testimony of Mr. C. W. Toms, Vice-President of petitioner, report of Commissioner Micou, claimant's exceptions to the Commissioner's report, and briefs of counsel.

The Court of Claims found for your petitioner and awarded judgment on February 15, 1926 in the amount of \$59,610.34, but refused to allow interest as a part of the measure of just compensation (R., 39).

THE STATUTES INVOLVED

The Act of Congress, approved March 4, 1917, (39 Stat. 1193), among other things, provided as follows:

"(a) * * * The words 'war material' shall include arms, armament, ammunition, stores, supplies, and equipment for ships and airplanes, and everything required for or in connection with the production thereof. * * *."

"(b) That in time of War, or of national emergency arising prior to March 1st, 1918, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:

First. Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such an order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. * * *."

"(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material in accordance with the provisions of paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

The Act of Congress approved June 15, 1917 (40 Stat. 182), among things, provided as follows:

"The President is hereby authorized and empowered, within the limits of the amount herein authorized—

"(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person."

* * * * *

"(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United

States has or has not any contract or agreement with the owner or occupier of such plant."

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any * * * material, or owning, leasing, or operating any plant equipped for the * * * production of * * * material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient."

"Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

"The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: * * *"

"The word 'material' shall include stores, supplies, and equipment for ships, and everything required for or in connection with the production thereof."

REASONS FOR GRANTING THE PETITION

Your petitioner respectfully presents the following grounds upon which this writ of certiorari is sought:

(a) The decision of the Court of Claims in this case is contrary to and in conflict with the decisions of this Court in *Seaboard Air Line Ry. Co., v. United States*, 261 U. S. 299, 43 Sup. Ct. Rep. 354; *United States v. Benedict*, 261 U. S. 294, 43 Sup. Ct. Rep. 357; *United States v. Rogers, et al.*, 255 U. S. 163, 41 Sup. Ct. Rep. 281; *Brooks-Seanlon Corp. v. United States*, 265 U. S. 106, 44 Sup. Ct. Rep. 471; *Brown, et al., v. United States*, 263 U. S. 78, 44 Sup. Ct. Rep. 92; in all of which cases this Court held that, when payment is not made contemporaneously with the taking, interest should be added to the fair market value of the property requisitioned to make up the full measure of just compensation guaranteed by the Constitution of the United States.

(b) The decision of the Court of Claims denies to your petitioner the full measure of just compensation guaranteed to it by the Fifth Amendment of the Constitution of the United States, and the Acts of Congress under which the property was taken.

(c) The decision of the Court of Claims that petitioner's right to recover depended upon contract, express or implied, is untenable and in conflict with the weight of authority.

This Court in the *Seaboard Air Line Ry. Co.* case, *supra*, held that the owner's right to just compensation for property requisitioned for war purposes does not depend on a promise, express or implied, to pay, but such payment is a necessary condition of the taking.

(d) The Court of Claims erroneously decided that the property of petitioner was not requisitioned, but purchased under a contract.

The premises considered, your petitioner respectfully prays that a writ of certiorari be issued under the seal of the Court, directed to the Court of Claims of the United

States, and that to that end all necessary and proper proceedings may be had.

Respectfully submitted,

LIGGETT & MYERS TOBACCO COMPANY.

By C. W. TOMS, *Vice-President*.

HUMPHREYS & DAY,

Attorneys for Petitioner.

ADRIAN C. HUMPHREYS,

CHESTER A. GWINN,

Of Counsel.

(31,893)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 1170

LIGGETT & MYERS TOBACCO COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF
CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 12, 1926		

[fol. 1]

IN THE COURT OF CLAIMS

No. D-549

LIGGETT & MYERS TOBACCO COMPANY, Claimant,

v.

THE UNITED STATES OF AMERICA, Defendants

I. PETITION—August 4, 1924

To the Honorable the Court of Claims:

The Liggett & Myers Tobacco Company respectfully represents:

1. That Claimant is a corporation, organized and existing under the laws of the State of New Jersey, having an office for the transaction of business at No. 212 Fifth Avenue in the City and State of New York:

2. That for a long time preceding the declaration of war with Germany on the 6th day of April, 1917, Claimant Company had been engaged in the manufacture and sale of tobacco and tobacco products, including cigarettes, smoking, plug and chewing tobacco of various kinds and brands, and remained so engaged after the declaration of War and continuously to the present time.

3. That the Act of Congress, approved March 4, 1917, (39 Stat. 1193) among other things, provided as follows:

(b) "That in time of War, or of national emergency arising prior to March 1st, 1918, to be determined by the President [fol. 2] by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:

First. Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or War material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such

an order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person."

(d) "That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition or take over any factory or part thereof, or any ships or War material in accordance with the provisions of paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as added to fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by Section twenty-four, paragraph twenty, Section one hundred and forty-five of the Judicial Code."

4. That an Act of Congress, approved June 15, 1917, (940 Stat. 182) among other things, provided as follows:

"The President is hereby authorized and empowered, within the limits of the amount herein authorized

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of [fol. 3] the War, and which are of the nature, kind and quantity usually produced, or capable of being produced by such person.

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take preference over all other orders and contracts placed with such person.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant, or part thereof, or any ship, charter or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive same, such person

shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to the said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by Section twenty-four, paragraph twenty, and Section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time."

5. That on or about August 31, 1918, Claimant received from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., what purported to be Navy Order No. N-4128, dated August 26, 1918, purporting to be issued pursuant to the provisions of said Acts of Congress, above referred to. Said order on its face stated that compliance therewith was obligatory and that no commercial order should be allowed to interfere with the deliveries therein [fol. 4] provided for. A copy of said order is attached hereto, marked Exhibit A and made a part hereof.

6. That under said obligatory order or requisition, Claimant was required to deliver to the United States, as called for by the Officer in Charge, Provisions and Clothing Depot, Brooklyn, New York, the brands and quantities, whether more or less, of cigarettes, smoking, chewing and plug tobacco, stated in said Order.

7. That on September 11, 1918, Claimant received from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., a modification, dated September 9, 1918, of Navy Order N-4128, requiring the claimant to comply with orders issued by the Quartermaster, Marine Corps, Washington, D. C., for the delivery of tobacco and tobacco products; upon the same terms and conditions as contained in said obligatory order. A copy of said modification is attached hereto, marked Exhibit B, and made a part hereof.

8. That on or about October 16, 1918, Claimant received from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., a second modification of Navy Order N-4128, referring in terms to

(a) Navy Order N-4122, Liggett & Myers Tobacco Company,

(b) Letter from Officer in Charge, Pro. and Clo. Depot to S & A 8 October file 50976/18X with letter from Liggett & Myers Tobacco Company 7 October enclosed.

This modification of said Order called for additional quantities of tobacco and tobacco products, more or less, as required, upon the same terms and conditions as contained in said original obligatory order. Copy of said modification [fol. 5] is attached hereto, marked Exhibit C and made a part hereof.

9. That on or about November 25, 1918, Claimant received from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., a third modification of Navy Order N-4128, referring in terms to

(a) Navy Order N-4128, Liggett & Myers Tobacco Company,

(b) S & A requisition 409, P & C 8 November, Provisions Navy 1919-1920.

This modification of said Order called for the delivery of certain additional quantities of tobacco and tobacco products, more or less, as required during the period from December 1, 1918, to February 28, 1919, upon the same terms and conditions as contained in said original obligatory order. Copy of said modification is attached hereto, marked Exhibit D, and made a part hereof.

10. That the said tobacco and tobacco products covered by said order or requisition, and its modifications, constitute "materials" or "war materials" as contemplated by said Acts of Congress, above referred to, and that Claimant, under said Acts of Congress, and under the Constitution of the United States, should be paid just compensation therefor.

11. That Claimant complied with said obligatory order and modifications thereof and delivered, from time to time, from September 9, 1918 to January 23, 1919, the brands and quantities of tobacco and tobacco products as called for by shipping instructions of the Navy Department and Marine Corps, and as shown on the attached schedule,

marked Exhibit E, and made a part hereof; that Claimant has received on account of payment for the various brands and quantities of tobacco and tobacco products, delivered by it to the Navy Department and Marine Corps as called for in said Order and modification thereof, in accordance with the unit prices stated in said Order (Exhibit A), the sum of Four Hundred and Twenty-three Thousand, Eight Hundred and Ninety-three Dollars and Ninety-six cents (\$423,893.96); that Claimant protested against being required to accept said unit prices as just compensation for its said tobacco and tobacco products and Claimant further maintained and claimed as just compensation the difference between said unit prices and prices 5% less than the prevailing market prices to wholesale dealers in said products at time and place of delivery, plus interest at six per centum per annum from date of delivery until paid.

12. That on or about December 4, 1920, the President of the United States, in accordance with, and subject to, the provisions of the Acts of Congress above referred to, determined just compensation for Claimant's tobacco and tobacco products delivered to the Navy Department and Marine Corps, to be as shown in a letter from the Bureau of Supplies and Accounts of the Navy Department, Washington, D. C., dated December 4, 1920, which purports to contain a final price determination to apply to tobacco and tobacco products furnished pursuant to Navy Order N-4128 and modifications thereof. A copy of said letter is attached hereto, marked Exhibit F, and made a part hereof.

Said letter, among other things, contains the following statements:

"Based on the Federal Trade Commission's report and with the concurrence of the Army and Marine Corps, the [fol. 7] Navy has established the following final prices, delivered to the Navy and Marine Corps, under Navy Order N-4128 and this Navy Order is hereby modified to apply under the terms and conditions of sub-paragraph (a) thereon, sub-paragraph (b) being eliminated."

Said letter further contained what purported to be a statement of account between Claimant and the Navy Department, showing an alleged balance due the Navy Depart-

ment, including the Marine Corps, of Four Thousand, Nine Hundred and Sixty-eight Dollars and Forty-four cents (\$4,968.44), and requested that check for said alleged balance should be mailed to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., together with the original of said letter signed as satisfactory, or not satisfactory in the space provided therefor. Said letter also contained the following statement:

"If the final prices herein fixed as just compensation are not satisfactory, claim should be made for the additional amount desired, in the manner prescribed by law as quoted in the original Navy Order."

13. That the final prices stated in the said letter, dated December 4, 1920, have been determined by the President of the United States to be just compensation for the several brands and quantities of tobacco and tobacco products delivered by the Claimant to the Navy Department and Marine Corps; that the said compensation so determined by the President of the United States was and is unsatisfactory to Claimant and does not constitute just compensation; that under the Constitution of the United States, and under the Acts of Congress referred to herein, Claimant is entitled to just compensation for said several brands and [fol. 8] quantities of tobacco and tobacco products; that just compensation therefor would be the market price at the time and place of delivery, plus interest at six percentum per annum from date of delivery until paid; that Claimant is, however, asking as just compensation at time of taking the unit prices shown on the schedule attached hereto, and made a part hereof, marked Exhibit E, which said unit prices are, and were five per cent less than the prevailing market prices paid to the Claimant in an open and free market for precisely similar products of the same brands, and in similar quantities, by wholesale dealers in said products at the same time and place of delivery and that Claimant, after the declaration of War against Germany on April 6, 1917, and prior to the receipt of the obligatory Order No. N-4128 dated August 26, 1918, sold large quantities of tobacco and tobacco products to the United States for the use of the Army and Navy at prices uniformly five per cent less than the lowest prevailing prices to wholesale dealers in said products.

14. That Claimant corporation and its officers are citizens of the United States, and have at all times borne true allegiance to the Government of the United States, and have never in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States; that Claimant is the owner of this claim, and no transfer or assignment thereof, or any part thereof, or interest therein, has been made; that no action other than as aforesaid has been had on this claim in Congress, or in any of the Departments or Bureaus of the United States Government.

15. That the quantities of materials shipped by Claimant to defendants were originally billed at \$483,504.30; said [fol. 9] sum represents the just compensation at the time of taking, figured on the quantities of materials actually delivered to and received by the defendants at the unit prices shown by Exhibit E hereof; that a further sum which, if added to the amount already paid to Claimant, will make up such amount as will be just compensation, is the sum of \$59,610.34, plus interest at six per centum per annum from date of delivery until paid; that the defendants are justly indebted to the said Claimant in the sum hereinbefore shown of \$483,504.30, less the payments made by defendant and alleged in paragraph 1 hereof aggregating \$423,893.96, leaving a balance now due and unpaid of \$59,610.34 plus interest at six per centum per annum from date of delivery until paid.

This petitioner is entitled to just compensation which is the monetary equivalent of its property as of the time of the taking or requisitioning thereof. Payment in full not having been made at the time of taking petitioner avers that its right to just and full compensation as of the date of the taking, requires the allowance of compensation or damages for delay in payment.

Petitioner avers that by reason of such delay in payment, it is entitled to compensation on the amount of claim hereinbefore set forth at the rate of six per centum per annum, and that said rate of six per centum per annum is a fair and reasonable value of the use of money during the period covered by the said claim.

Petitioner avers that if allowed all just credits and offsets there remains due and unpaid to it from the defendant a

balance of just compensation, and that it is justly entitled to the sum of \$59,003.30, from the United States, together with just compensation or damages for the detention thereof measured at the rate of six percentum per annum on the amount due for each delivery from the respective dates of [fol. 10] deliveries up to the date of payment on account thereof and thereafter on the balance due thereon to the date of payment.

Wherefore, your petitioner demands judgment against the defendant in the sum of \$59,610.34 together with just compensation or damages for the detention thereof, as aforesaid.

Respectfully submitted, Liggett & Myers Tobacco Company, by C. C. Dula, President.

Duly sworn to by C. C. Dula. Jurat omitted in printing.

[fol. 11] CLAIMANT'S EXHIBIT A TO PETITION

Navy Department, Bureau of Supplies and Accounts,
Washington, D. C.

Navy Order Number N-4128.
Bureau of Supplies & Accounts.

26 August, 1918.

Liggett & Myers Tobacco Co., 212 Fifth Ave., New York,
N. Y.

Sir:

1. Pursuant to the provisions of the Acts of Congress, Naval Appropriation Act approved March 4, 1917, and the Urgent Deficiency Act approved June 15, 1917 (quoted in part on reverse hereof), and acting under the direction of the President of the United States, an order is hereby placed with you under the conditions stated in subparagraph (b) (subparagraph (a) is eliminated), to furnish and deliver material needed by the Navy as listed below. Compliance with this order is obligatory, and no commercial orders shall be allowed by you to interfere with the delivery herein provided for.

(a) The price herein stated has been determined as reasonable and as just compensation for the material to be delivered; payment will be made accordingly. If the amount is not satisfactory, you will be paid 75 per centum of such amount, and further recourse may be had in the manner prescribed in the above-cited acts. Please indicate conditions under which you accept this order by filling in and signing certificate below, returning original copy of order. If you state the price fixed as reasonable is not satisfactory, 75 per cent only of the unit price will be paid. If payment in full is accepted it will be considered as constituting a formal release of all claims arising under this order.

(b) As it is impracticable to now determine a reasonable and just compensation for the material to be delivered, the fixing of the price will be subject to later determination. You are assured of a reasonable profit under this order; and as an advance payment you will be paid [fol. 12] the unit prices stated hereon, with the understanding that such advance payment will not be considered as having any bearing upon the price to be subsequently fixed. Any difference between the amount of such advance payment and the amount finally determined upon as being just and reasonable will be paid to you or refunded by you, as the case may be. The unit price stated herein will not prejudice any future price determination or be considered as a precedent in determining such increases or decreases as may be later decided upon as proper.

(c) The order must be accepted and filled in any event, and if placed in accordance with subparagraph (a), you are only required to indicate below whether the price stated and fixed is satisfactory or is not satisfactory. If not satisfactory, a separate letter of comment and qualification must accompany the original order that is to be signed by you and returned. If order is placed under subparagraph (b), original is to be signed and returned. The duplicate copy may be retained by you in either case.

2. Deliveries are required to be made, in whole or in part, as soon as possible and before the expiration of the time limit as stated herein.

Delivery will be made to As directed by Officer-in-Charge within as stated below, (Pro. & Clo. Depot, Brooklyn, N. Y.) the time allowed for deliveries counting from — — —, — — —.

3. Dealers' bills are to be sent to Officer-in-Charge, Pro. & Clo. Depot, Brooklyn, N. Y., who is authorized to prepare vouchers in payment.

(a) In forwarding bills, the original bill must bear the following certificate: "Prices are certified to be those as stated in Navy Order No. —; payment not received."

4. If this order is based on deliveries f. o. b. works, your material can not be shipped except under orders from the naval inspecting officer for your district, and then only under a Government bill of lading to be furnished by that [fol. 13] officer, in which case transportation charges must not be prepaid.

5. The conditions appearing on the reverse side hereon are made part of this order.

N-4128.

Reference: P and C letter 30 July 1918, File 46231/BC. P and C letter 21 August 1918, File 47365/18C. Approp. Prov. Navy 1919-20.

- 30,000 Plugs "Star" Brand Chewing Tobacco, each plug to weigh 16 ounces.
- 150,000 Tins "Velvet" Brand Smoking Tobacco, packed 2 ounces net per tin.
- 287,500 Packages "Chesterfield" Brand Cigarettes, packed 20 cigarettes per package.
- 1,000,000 Packages "Piedmont" Brand Cigarettes, packed 16 cigarettes per package.
- 800,000 Packages "Fatima" Brand Cigarettes, packed 16 cigarettes per package.

These quantities are the estimated Navy requirements for period to 1 December, 1918. The Navy does not guarantee to purchase the above stated quantities and reserves the right to increase or decrease these quantities in conformity with the requirements of the Navy during the above stated period. Shipment will be made only on receipt of an order from the Officer-in-Charge, Provisions & Clothing Depot, based on this Navy Order.

It is further stipulated that any proportion of the Navy's requirements will be furnished Tax Paid or In Bond, as directed by the Officer-in-Charge, Provisions & Clothing Depot.

Domestic or Export Cases are to be supplied ordered by the Officer-in-Charge, Provisions & Clothing Depot, Brooklyn, N. Y.

Inspection at point of delivery.

Provisional Prices

"Star" Brand Chewing Tobacco:

Domestic Tax Paid, \$.49 net per plug, f. o. b. destination.
In Bond, \$.38 net per plug, f. o. b. factory.

[fol. 14] "Velvet" Brand Smoking Tobacco:

Domestic Tax Paid, \$.09 net per tin, f. o. b. destination.
In Bond, \$.075 net per tin, f. o. b. factory.

"Chesterfield" Brand Cigarettes:

Domestic Tax Paid, \$.09 net per package, f. o. b. destination.
In Bond, \$.055 net per package, f. o. b. factory.

"Piedmont" Brand Cigarettes:

Domestic Tax Paid, \$.07 net per package f. o. b. destination.
In Bond, \$.04 net per package, f. o. b. factory.

"Fatima" Brand Cigarettes:

Domestic Tax Paid, \$.10 net per package, f. o. b. destination.
In Bond, \$.07 net per package, f. o. b. factory.

Domestic Tax Paid shipments to be made on prepaid Commercial Bills of Lading.

In Bond shipments to be made on Commercial Bills of Lading, freight prepaid and added to the invoice as an additional item.

War Tax exemption certificates will be furnished by the Officer-in-Charge and are to be used on all shipments.

Payments will be made only by the Officer-in-Charge, Provisions & Clothing Depot, Brooklyn, N. Y.

MEMO.—See S and A File 319-8.

Contractor's Copy.

By direction of the Secretary of the Navy.

(Signed) S. McGowan, Paymaster General of the Navy.

The above order is accepted subject to the conditions in subparagraph (b) above.

Liggett & Myers Tobacco Co., by C. W. Toms, Vice-President.

Witness: ———

[fol. 15] CLAIMANT'S EXHIBIT B TO PETITION

In reply, please refer to No. N-4128—(P).

Navy Department (Bureau of Supplies and Accounts),
Washington, D. C.

9 September, 1918.

Liggett & Myers Tobacco Co., 212 Fifth Avenue, New York,
N. Y.:

Subject: Modification of Navy Order.

Reference: Navy Order N-4128, Liggett & Myers Tobacco Co., New York, N. Y.

SIRS: Navy Order N-4128 is hereby modified to include the following paragraph:

“Any orders issued by the Quartermaster, Marine Corps, Washington, D. C. for the brands of tobacco specified in this Navy Order are to be executed and billed at the prices stated thereon. Shipping instructions will be issued and payment will be made by the Quartermaster, Marine Corps, Washington, D. C.”

Respectfully, (Signed) Samuel McGowan, Paymaster General of the Navy.

Goods Ordered on Account of Navy Order No. 4128

Date ordered	Star	Velvet	Chest.	Piedmont	Fatima
Aug. 30 (Navy)	25,000 lbs. I. B.	100,000 Tins. 2 oz. I. B.	50,000 Pkgs. 20s I. B. 50,000 Pkgs. 20s T. P.	50,000 Pkgs. 16s I. B. 50,000 Pkgs. 16s T. P.	50,000 Pkgs. 20s I. B. 50,000 Pkgs. 20s T. P.
Sept. 18 (Navy)		10,000 Tins. 17/8 oz. T. P.	50,000 Pkgs. 20s T. P.	50,000 Pkgs. 16s T. P.	50,000 Pkgs. 20s T. P.
Sept. 25 (Navy)	2,500 lbs. T. P.	25,000 Tins. 17/8 oz. T. P.	50,000 Pkgs. 20s T. P.	200,000 Pkgs. 16s T. P.	200,000 Pkgs. 20s T. P.
Oct. 9 (Navy)	1,250 lbs. T. P. 1,250 lbs. I. B.	7,500 Tins. 2 oz. T. P. 7,500 Tins. 2 oz. I. B.	43,750 Pkgs. 20s T. P. 43,750 Pkgs. 20s I. B.	375,000 Pkgs. 20s T. P. 375,000 Pkgs. 20s I. B.	300,000 Pkgs. 20s T. P. 300,000 Pkgs. 20s I. B.
Oct. 22 (Navy)			200,000 Pkgs. 20s T. P.		75,000 Pkgs. 20s T. P.
Sept. 12 (Marine)	4,000 lbs. T. P. 2,400 lbs. I. B. 1,500 lbs. T. P.				

Goods Ordered on Account of Navy Order No. 4128—Cont'd

Date ordered	Star	Velvet	Chest.	Piedmont	Fatima
Oct. 17 (Marine)	.....	.....	62,500 Pkgs. 20s T. P.	75,000 Pkgs. 20s T. P.	37,500 Pkgs. 20s T. P.
			62,500 Pkgs. 20s T. P.	75,000 Pkgs. 20s T. P.	37,500 Pkgs. 20s T. P.
			18,750 Pkgs. 20s I. B.	27,500 Pkgs. 20s I. B.	12,500 Pkgs. 20s I. B.
			18,750 Pkgs. 20s T. P.	27,500 Pkgs. 20s T. P.	12,500 Pkgs. 20s T. P.
			3,750 Pkgs. 20s I. B.	7,500 Pkgs. 20s I. B.	3,750 Pkgs. 20s I. B.
Total	37,900 lbs.	150,000 Tins.	653,750 Pkgs.	962,500 Pkgs. 20s	1,128,750 Pkgs.
				350 000 Pkgs. 16s	
Navy Order #4128 called for	30,000 lbs.	150,000 Tins.	287,500 Pkgs. 20s	1,312,500 Pkgs. 1,000,000 Pkgs. 16s	800,000 Pkgs. 16s

[fol. 17]

Piedmont, 16s

	Tax paid		In bond	
	Per pkg.	Per M	Per pkg.	Per M
Our Price.....	.077	4.8125	.0451	2.81875
Navy Price.....	.07	4.375	.04	2.50
		<u>.4375</u>		<u>.31875</u>

Chesterfields, 20s

	Tax paid		In bond	
	Per pkg.	Per M	Per pkg.	Per M
Our Price.....	.1026	5.13	.06278	3.139
Navy Price.....	.09	4.50	.055	2.75
		<u>.63</u>		<u>.389</u>

Fatima, 16s

	Tax paid		In bond	
	Per pkg.	Per M	Per pkg.	Per M
Our Price.....	.10902	6.81375	.07715	4.821875
Navy Price.....	.10	6.25	.07	4.375
		<u>.56375</u>		<u>.446875</u>

Velvet, 2 oz.

	Tax paid		In bond	
	Per pkg.	Per lb.	Per pkg.	Per lb.
Our Price.....	.1026	.8208	.0886	.7088
Navy Price.....	.09	.72	.075	.60
		<u>.1008</u>		<u>.1088</u>

Star

	Tax paid		In bond	
Our Price.....	.5472	per lb.	.42425	per lb.
Navy Price.....	.49		.38	
	<u>.0572</u>		<u>.04425</u>	

[fol. 18] CLAIMANT'S EXHIBIT C TO PETITION

Navy Department, Washington, D. C.

N-4128—PPH.

14 October, 1918.

Liggett & Myers Tobacco Company, 212 Fifth Avenue, New York, N. Y.

Subject: Modification of Navy Order N-4128.

References: (a) Navy Order N-4128—Liggett & Myers Tobacco Company. (b) Letter from Officer-in-Charge, Pro. & Clo. Depot, to S and A, 8 October, file 50976/18X, with letter from Liggett & Myers Tobacco Co., 7 October, enclosed.

SIRS: In accordance with information set forth in reference (b) Navy Order N-4128 is hereby modified to provide for the delivery and acceptance of the following size packages of cigarettes at provisional prices stated:

“Fatima” Brand Cigarettes, packed 20 cigarettes per package.

“Piedmont” Brand Cigarettes, packed 10 and 20 cigarettes per package.

Provisional Prices

“Fatima” Brand Cigarettes:

Domestic Tax Paid, \$.125 net per package, f. o. b. destination.

In Bond, \$.085 net per package, f. o. b. factory.

“Piedmont” Brand Cigarettes:

Domestic Tax Paid (10's), \$.04 net per package, f. o. b. destination; (20's), \$.085 per package, f. o. b. destination.

In Bond (10's), \$.025 net per package, f. o. b. factory; (20's), \$.05 net per package, f. o. b. factory.

This modification will not have any bearing on the cigarettes already shipped in accordance with the original Navy [fol. 19] Order. It is further understood that the Navy will not consent to a further modification of this Navy Order due to changes in the style of packages that might be

contemplated by the Liggett & Myers Tobacco Company during the existence of this Navy Order.

14 October, 1918. N-4128-PPH.

The original of this letter is to be signed and witnessed in the spaces below and returned to the bureau of Supplies and Accounts, Navy Department, Washington, D. C.

Respectfully, Samuel McGowan, Paymaster General of the Navy.

(Supplementary Clause)

Navy Order N-4128 is hereby accepted as modified above. Liggett & Myers Tobacco Co., by (Signed) C. W. Toms, Vice-President.

Witness: (Signed) O. B. Arthur.

CC to contractor, officer-in-charge Fleet Supply Base, S. Brooklyn, N. Y., U. S. Marine Corps, Quartermaster, Mr. Esberg, War Industries Board, Disbursing Division, Accounting Division, Auditor for the Navy, Navy Order Section.

[fol. 20] CLAIMANT'S EXHIBIT D TO PETITION

In reply, please refer to No. N-4128-PP.

Navy Department (Bureau of Supplies and Accounts),
Washington, D. C.

22 November, 1918.

Liggett & Myers Tobacco Co., 212 Fifth Avenue, New York,
N. Y.

Subject: Modification Navy Order N-4128.

Reference: (a) Navy Order N-4128, Liggett & Myers Tobacco Co.; (b) S and A requisition 409 P and C 8 November, Provisions Navy 1919-1920.

SIRS: Navy Order N-4128 is hereby modified to provide for delivery of the following additional quantities of tobacco, more or less, as required during period from 1 December, 1918, to 28 February, 1919:

75,000 plugs Star Chewing Tobacco, each plug to weigh 16 oz.

400,000 packages Chesterfield Cigarettes, packed 20 cigarettes per package.

2,000,000 packages Piedmont Cigarettes, packed 20 cigarettes per package.

1,000,000 packages Fatima Cigarettes, packed 20 cigarettes per package.

The above quantities are estimated only and shipment is to be made only on receipt of order for Officer-in-Charge, Fleet Supply Base, South Brooklyn, N. Y.

All conditions stipulated in the original Navy Order, or any modification authorized heretofore, are likewise applicable to this modification. All shipments are to be billed at the provisional prices specified in the original Navy Order, or any modification made subsequent thereto.

It is requested that the original of this letter, modifying the above Navy Order be signed in the spaces below [fol. 21] and returned to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

Respectfully, Samuel McGowan, Paymaster General
of the Navy.

(Supplementary Clause)

Navy Order N-4128 as modified above is hereby accepted.

Liggett & Myers Tobacco Co., (Signed) by C. W.
Toms, Vice-President.

Witness: (Signed) C. B. Arthur.

CC to contractor, officer in charge Fleet Supply Base, So. Brooklyn, N. Y., Accounting Division, Auditor of Navy, Navy Order Section.

CLAIMANT'S EXHIBIT E TO PETITION
Statement of Account on Navy Contract #4128, Delivered to Navy Department

In Bond					
Date of invoice	I. & M. Invoice No.	Brand	Quantity	Price	Amount
9/ 9/18	X-614	Fatima	20s	096976	\$4,883 34
10/29/18	X-678	"	20s	096976	29,092 80
9/13/18	X-613	Chesterfield	20s	0627776	3,192 80
10/28/18	X-677	"	20s	062776	2,778 28
11/14/18	X-700	"	20s	062776	3,175 17
9/18/18	X-615	Piedmont	16s	0451	2,251 39
10/31/18	X-679	"	20s	056376	21,174 83
11/22/18	X-699-A	"	20s	062776	18,832 80
12/13/18	X-699-B	"	20s	062776	7,533 12
12/18/18	X-699-C	"	20s	062776	11,299 68
9/14/18	X-163	Velvet	2 oz.	0886	9,120 63
10/31/18	X-206	"	2 oz.	0886	650 68
11/15/18	X-214	"	2 oz.	0886	1,835 96
9/30/18	X-162	Star	16 oz.	42425	10,858 56
11/ 6/18	X-205	"	16 oz.	42425	560 79
11/22/18	X-215	"	16 oz.	42425	2,185 11
					<hr/> \$129,425 94

Statement of Account on Navy Contract #4128, Delivered to Navy Department—Cont'd

Tax Paid

Date of invoice	L. & M. invoice No.	Brand	Quantity	Price	Amount
9/18/18	D-521	Fatima	20s	1368	6,840 00
9/30/18	D-533	"	20s	1368	
		Piedmont	16s	077	10,697 53
10/11/18	D-526	Fatima	20s	1368	27,357 74
10/31/18	D-537	"	20s	1368	41,034 06
11/14/18	D-540	"	20s	1368	10,187 72
		{ Fatima	20s	1368	
11/30/18	D-566	{ Chesterfield	20s	1026	38,610 91
		{ Piedmont	20s	1026	
		Chesterfield	20s	1026	
9/16/18	D-520	"	20s	1026	5,130 00
9/24/18	D-524	"	20s	1026	5,130 00
10/3/18	D-525	"	20s	1026	5,128 89
10/25/18	D-536	"	20s	1026	4,487 43
10/29/18	D-539	"	20s	1026	20,513 68
11/14/18	D-548	"	20s	1026	5,128 49
1/23/19	D-576	"	20s	1026	17,955 00
9/23/18	D-522	Piedmont	16s	077	3,843 84
10/9/18	D-527	"	16s	077	15,382 17
11/6/18	D-538	"	20s	09525	10,401 30
11/8/18	D-538	"	20s	09525	25,260 30
11/16/18	D-557	"	20s	1026	30,730 75

9/24/18	D-179	Velvet	.....	1 7/8 oz.	9,936 Tins	1026	1,019 43
10/ 8/18	D-180	"	.....	1 7/8 oz.	25,056 "	1026	2,567 91
10/31/18	D-187	"	.....	2 oz.	7,344 "	10944	802 87
11/15/18	D-240	"	.....	2 oz.	19,872 "	10944	2,172 46
10/ 4/18	D-181	Star	.....	16 oz.	2,496 lbs.	5472	1,365 05
10/20/18	D-186	"	.....	16 oz.	1,248 "	5472	682 58
11/18/18	D-241	"	.....	16 oz.	4,992 "	5472	2,730 04
11/23/18	D-261	"	.....	16 oz.	11,472 "	5472	6,265 00
							<hr/>
Total deliveries to Navy Department							\$301,425 15
							\$430,851 09

Date of Invoice	L & M Invoice No.	In Bond			Amount
		Brand	Quantity	Price	
11/22/18	{X-664	Fatima	75,000	096976	\$1,021.89
		Chesterfield	75,000	062776	
		Piedmont	150,000	056376	
10/31/18	X-665	Fatima	250,000	096976	1,212.20
10/31/18	X-666	Chesterfield	375,000	062776	1,177.05
11/6/18	X-667	Piedmont	552,000	056376	1,555.98
9/30/18	X-175	Star	2,432 lbs.	42425	1,075.91
					<hr/>
					<hr/>
					<hr/>
					\$6,043.03

Tax Paid				
11/9/18	D-533	Piedmont	1,497,600	09525
11/15/18	D-527	Fatima	750,000	1368
11/6/18	{D-530	"	250,000	1368
		Chesterfield	375,000	1026
		Piedmont	550,000	09525
11/12/18	D-531	Fatima	750,000	1368
10/22/18	D-528	Chesterfield	1,250,000	1026
10/24/18	D-532	"	1,250,000	1026
11/9/18	D-529	Piedmont	1,497,600	09525
				\$7,132.32
				5,130.00
				6,253.13
				5,130.00
				6,412.50
				6,412.50
				7,132.32

9/20/18	D-176	Star	16 oz.	1,488 lbs.	5472	814 23
9/21/18	D-175	"	16 oz.	4,008 "	5472	2,193 18

Total deliveries to Marine Corps	\$46,610 18
	\$52,653 21

Summary

Total deliveries to Navy Department	\$430,851 09
Total deliveries to Marine Corps	52,653 21
Grand total	\$483,504 30

[fol. 24] CLAIMANT'S EXHIBIT F TO PETITION

N-4128—PO-R. 100-17.

Navy Department (Bureau of Supplies and Accounts),
Washington, D. C.

4 December, 1920.

Liggett & Myers Tobacco Company, 212 Fifth Avenue, New
York City.

Subject: Final price determination.

Reference: Navy Order N-4128.

SIRS: Based on the Federal Trade Commission's Report, and with the concurrence of the Army and Marine Corps, the Navy has established the following final prices for tobacco required under Navy Order N-4128, and this Navy Order is hereby modified to apply under the terms and conditions of subparagraph A thereon, subparagraph B being eliminated:

		Final price
Chesterfield	20 Dom.	\$.09322
	20 Exp.	.05146
Fatima	20 Dom.	.12019
	20 Exp.	.07870
Piedmont	20 Dom.	.08707
	20 Exp.	.04403
	16 Dom.	.06926
	16 Exp.	.03453
Velvet	17 $\frac{1}{8}$ oz. Dom.	.08450
	17 $\frac{1}{8}$ oz. Exp.	.07464
	2 oz. Dom.	.08666
	2 oz. Exp.	.07626
Star	16 oz. Dom.	.54011
	16 oz. Exp.	.40486

The above final prices are all f. o. b. factory. For any shipment on which freight was paid by the company, credit for the actual amount paid will be allowed by the Navy on presentation of properly substantiated invoices. These [fol. 25] final prices have been determined on a basis of cost plus a reasonable return on investment. In determining costs, the cost of leaf tobacco has been computed at the

average price of stock on hand, all selling expense and various minor items, such as donations, excess profits, taxes, etc., being eliminated. Profit on the above cost of production has been allowed to permit of a return of 10 per cent on capital investment, including common and preferred stock but eliminating outside investments and intangibles, such as good will, etc.

On this basis the records of the Navy show the account of the Liggett & Myers Tobacco Company under this Navy Order to stand as follows:

Quantity Delivered to Navy

		Provis. price paid	Total paid	Price now fixed	Total
34,992	Velvet	17 1/8 oz. Dom.	\$3,149 28	\$08450	\$2,956 82
27,216	"	2 oz. Dom.	2,449 44	08666	2,358 54
127,216	"	2 oz. Exp.	9,541 20	07626	9,701 49
700,920	Piedmont	20 Dom.	59,578 20	08707	61,029 10
975,600	"	20 Exp.	48,780 00	04403	42,955 67
299,832	"	16 Dom.	20,988 24	06926	20,766 36
49,920	"	16 Exp.	1,996 80	03453	1,723 74
779,530	Chesterfield	20 Dom.	70,157 70	09322	72,667 79
143,750	"	20 Exp.	7,906 25	05146	7,397 37
816,400	Fatima	20 Dom.	958 00	12019	92,113 62
50,000	"	20 Dom.	5,000 00	12019	6,009 50
300,000	"	20 Exp.	25,500 00	07870	23,610 00
50,000	"	20 Exp.	3,500 00	07870	3,935 00
20,202	Star	16 oz. Dom.	9,898 98	54011	10,911 30
31,296	"	16 oz. Exp.	11,892 48	40486	12,670 50
Amount due Navy					\$370,806 80
					5,331 77
					<u>\$376,138 57</u>

Quantity Delivered to Marine Corps

177,260	Piedmont	20	Dom	085	\$15,066 50	\$	08707	\$15,434 03
35,100	"	20	Exp	05	1,755 00		04403	1,554 25
143,750	Chesterfield	20	Dom	09	12,937 40		09322	13,400 38
22,500	"	20	Exp	055	1,237 50		05146	1,157 85
[fol. 26]								
87,500	Fatima	20	Dom	125	10,937 50		12019	10,516 63
16,250	"	20	Exp	085	1,381 25		07870	1,278 87
5,508	Star	16	oz. Dom	49	2,698 92		54011	2,974 93
2,432	"	16	oz. Exp.	38	924 16		40486	984 62
					<hr/>			
Amount due Company					\$46,938 23			
					363 33			
					<hr/>			
					\$47,301 56			
					<hr/>			
					\$47,301 56			

If the deliveries stated in the above tabulation do not agree with deliveries shown by the company's records, it is requested that the Navy be advised in order that all questions of fact in this respect may be reconciled.

From the amount of \$4,968.44, which is the amount due the Navy on deliveries made to the Navy less the amount due the company on deliveries made to the Marine Corps, is to be deducted any freight prepaid by the company. Check for the balance should be mailed to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., together with the original of this letter signed as satisfactory or not satisfactory in the spaces provided below.

If the final prices herein fixed as just compensation are not satisfactory, claim should be made for the additional amount desired in the manner prescribed by law as quoted in the original Navy Order.

Respectfully, Samuel McGowan, Paymaster General
of the Navy.

Navy Order N-4128 is hereby accepted subject to the conditions of subparagraph A of the original Navy Order. The prices fixed above as final are satisfactory.

By ———.

Witness: ———.

—————

[fol. 27] II. GENERAL TRAVERSE—October 4, 1924

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

—————

III. ARGUMENT AND SUBMISSION

On January 26, 1926, this case was argued and submitted on merits by Mr. C. A. Gwinn, for plaintiff, and by Mr. D. E. Rorer, for the defendant.

[fol. 28] IV. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Campbell, Ch. J.**—Filed February 15, 1926

This case having been heard by the Court of Claims upon a stipulation of facts signed on behalf of the United States by Mr. Herman J. Galloway, Assistant Attorney General, and by Mr. Adrian C. Humphrey for the plaintiff, and the evidence, the court makes the following

SPECIAL FINDINGS OF FACT

I

Plaintiff, The Liggett & Myers Tobacco Company, is a corporation organized and existing under the laws of the State of New Jersey, having an office in the city and State of New York.

II

For a long time and before the war with Germany the plaintiff had been engaged in the manufacture and sale of tobacco products, including cigarettes, smoking, plug, and chewing tobacco of various kinds and brands, and continued in said business during said war and has been, and is now, engaged in that business.

III

On or about the 26th day of August, 1918, and bearing that date, a paper designated as Navy order No. N-4128 was issued out of the Bureau of Supplies and Accounts of the Navy Department at Washington addressed to the plaintiff at 212 Fifth Avenue, New York. The said order was upon a printed form in use in the said bureau, with blanks filled in by the typewriter, and is in words and figures as follows:

“1. Pursuant to the provisions of the Acts of Congress, Naval Appropriation Act approved March 4, 1917, and the Urgent Deficiency Act approved June 15, 1917 (quoted in part on reverse hereof), and acting under the direction of the President of the United States, an order is hereby placed with you under the conditions stated in subpara-

graph (b) (subparagraph (a) is eliminated), to furnish and deliver material needed by the Navy as listed below. Compliance with this order is obligatory, and no commercial orders shall be allowed by you to interfere with the de-[fol. 29] livery herein provided for.

“(a) The price herein stated has been determined as reasonable and as just compensation for the material to be delivered; payment will be made accordingly. If the amount is not satisfactory, you will be paid 75 per centum of such amount, and further recourse may be had in the manner prescribed in the above-cited acts. Please indicate conditions under which you accept this order by filling in and signing certificate below, returning original copy of order. If you state the price fixed as reasonable is not satisfactory, 75 per cent only of the unit price will be paid. If payment in full is accepted it will be considered as constituting a formal release of all claims arising under this order.

“(b) As it is impracticable to now determine a reasonable and just compensation for the material to be delivered, the fixing of the price will be subject to later determination. You are assured of a reasonable profit under this order; and as an advance payment you will be paid the unit prices stated hereon, with the understanding that such advance payment will not be considered as having any bearing upon the price to be subsequently fixed. Any difference between the amount of such advance payment and the amount finally determined upon as being just and reasonable will be paid to you or refunded by you, as the case may be. The unit price stated herein will not prejudice any future price determination or be considered as a precedent in determining such increases or decreases as may be later decided upon as proper.

“(c) The order must be accepted and filled in any event, and if placed in accordance with subparagraph (a), you are only required to indicate below whether the price stated and fixed is satisfactory or is not satisfactory. If not satisfactory, a separate letter of comment and qualification must accompany the original order that is to be signed by you and returned. If order is placed under subparagraph (b), original is to be signed and returned. The duplicate copy may be retained by you in either case.

"2. Deliveries are required to be made, in whole or in part, as soon as possible and before the expiration of the time limit as stated herein. Delivery will be made to As directed by Officer-in-Charge, Pro. & Clo. Depot, Brooklyn, N. Y., within — as stated below —, the time allowed for deliveries counting from — —, —.

"3. Dealers' bills are to be sent to Officer-in-Charge, Pro. & Clo. Depot, Brooklyn, N. Y., who is authorized to prepare vouchers in payment.

"(a) In forwarding bills, the original bill must bear the following certificate: 'Prices are certified to be those as stated in Navy Order No. —; payment not received.'

"4. If this order is based on deliveries f. o. b. works, your material can not be shipped except under orders from the naval inspecting officer for your district, and then only under a Government bill of lading to be furnished by that officer, in which case transportation charges must not be prepaid.

"5. The conditions appearing on the reverse side hereon are made a part of this order.

"Reference: P and C letter 30 July, 1918, File 46231/BC; P and C letter 21 Aug., 1918, File 47365/18C; Approp. Prov. Navy 1919-20.

[fol. 30] "30,000 Plugs 'Star' Brand Chewing Tobacco. Each plug to weigh 16 ounces. 150,000 Tins 'Velvet' Brand Smoking Tobacco, packed 2 ounces net per tin. 287,500 Packages 'Chesterfield' Brand Cigarettes, packed 20 cigarettes per package. 1,000,000 Packages 'Piedmont' Brand Cigarettes, packed 16 cigarettes per package. 800,000 Packages 'Fatima' Brand Cigarettes, packed 16 cigarettes per package.

"These quantities are the estimated Navy requirements for period to 1 December, 1918. The Navy does not guarantee to purchase the above-stated quantities and reserves the right to increase or decrease these quantities in conformity with the requirements of the Navy during the above-stated period. Shipment will be made only on receipt of an order from the Officer-in-Charge, Provisions & Clothing Depot, based on this Navy Order.

"It is further stipulated that any proportion of the Navy's requirements will be furnished Tax Paid or In

Bond, as directed by the Officer-in-Charge, Provisions & Clothing Depot.

“Domestic or Export Cases are to be supplied as ordered by the Officer-in-Charge, Provisions & Clothing Depot, Brooklyn, N. Y.

“Inspection at point of delivery.

“Provisional Prices

“‘Star’ Brand Chewing Tobacco: Domestic Tax Paid, \$.49 net per plug, f. o. b. destination. In Bond, \$38 net per plug, f. o. b. factory.

“‘Velvet’ Brand Smoking Tobacco: Domestic Tax Paid, \$.09 net per tin, f. o. b. destination. In Bond, \$.075 net per tin, f. o. b. factory.

“‘Chesterfield’ Brand Cigarettes: Domestic Tax Paid, \$.09 net per package, f.o. b. destination. In Bond, \$.055 net per package, f. o. b. factory.

“‘Piedmont’ Brand Cigarettes: Domestic Tax Paid, \$.07 net per package, f. o. b. destination. In Bond, \$.04 net per package, f. o. b. factory.

“‘Fatima’ Brand Cigarettes: Domestic Tax Paid, \$.10 net per package, f. o. b. destination. In Bond, \$.07 net per package, f. o. b. factory.

“Domestic Tax Paid shipments to be made on prepaid Commercial Bills of Lading.

“In Bond shipments to be made on Commercial Bills of Lading, freight prepaid and added to the invoice as an additional item.

“War Tax exemption certificates will be furnished by the Officer-in-Charge and are to be used on all shipments.

“Payments will be made only by the Officer-in-Charge, Provisions & Clothing Depot, Brooklyn, N. Y.

“By direction of the Secretary of the Navy.

“Samuel McGowan, Paymaster General of the Navy.

“The above order is accepted subject to the conditions in subparagraph b above.

“Liggett & Myers Tobacco Co., by C. W. Toms, Vice-President.

“Witness: — — —.”

[fol. 31] On the reverse side of said printed form appeared extracts from the act of March 4, 1917, and the act of June 15, 1917, as follows:

“(b) That in time of war, or of national emergency arising prior to March first, nineteen hundred and eighteen, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:

“First. Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person.

“(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material, in accordance with the provisions of paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

“The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

“(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity

usually produced or capable of being produced by such person.

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person.

"Whenever the United States shall cancel, modify, suspend, or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

"The President may exercise the power and authority hereby vested in him, and expend the money herein and [fol. 32] hereafter appropriated through such agency or agencies as he shall determine from time to time."

Following these extracts there was also on the reverse side of said printed form certain "conditions" with sub-headings, as follows:

"Specifications

"1. The article or articles furnished or services performed under this order must conform in all respects to the requirements of the specifications as indicated hereon, the "Conditions," and "Deliveries," contained herein. In any case where the specifications do not provide to the contrary, all workmanship and materials entering into the manufacture or construction of the material delivered must be of the very best quality and manufacture.

“Inspection

“2. The material delivered or service rendered shall be subject to inspection and examination by the officer or officers authorized by the Navy Department, and will not be accepted unless conforming in all respects to the requirements of the specifications. If the specifications direct inspection before shipment, the shipment must not be made until the material has been inspected and orders given for shipment by the inspection officer, unless specifically authorized by the bureau concerned.

“Address Correspondence

• • • • •

“Payments

“4. Upon presentation of the customary bills, deliveries or services will be inspected and vouchers covering same will be passed as soon as practicable—the Government reserving the right to make payments only when all the articles or services embraced in any one class or item, or the entire order, have been delivered or performed and accepted when such action is considered for its best interests.

“Patent Rights, etc.

• • • • •

“Consignments

• • • • •

“Tag Car

• • • • •

“Shipping Memoranda

• • • • •

“7. Each delivery must be accompanied by truckman's receipts, bills of lading, or shipping invoices, in duplicate, giving name of dealer, number of this order, and class, and a full statement of quantities, weights, packages, etc.

Duplicate dealers' bills, giving the same identifying information, including prices, etc., must also be rendered to the supply officer of the yard concerned prior to or at the time of each delivery.

"Deliveries

.

"Caution

.

[fol. 33]

"Rail Delivery

.

"Water Delivery

.

"Dray Delivery

.

"Yard Appliances

.

"Responsibility Prior to Acceptance

.

"Deliveries in Yard Hours

.

"Rejected Articles

.

"9. The above instructions and those on the opposite side must be carefully followed to avoid delay after delivery. If any matters are not understood, they may be referred to the Bureau of Supplies and Accounts for instructions."

The descriptions of the different kinds of tobacco and the provisional prices stated, following paragraph 5 of the

order, are upon a typewritten sheet pasted to and attached to the printed order.

IV

Upon receipt of the said order on or about August 31, 1918, plaintiff made indorsement thereon that the above order "is accepted, subject to the conditions in subparagraph b above," and returned the original of said order to the Bureau of Supplies and Accounts of the Navy Department.

On or about the 9th day of September, 1918, the Bureau of Supplies and Accounts by Samuel McGowan, Paymaster General of the Navy, addressed a letter to the plaintiff on the subject of modification of Navy order N-4128, to the effect that said Navy order be modified to include the paragraph: "Any orders issued by the Quartermaster, Marine Corps, Washington, D. C., for the brands of tobacco specified in this Navy order are to be executed and billed at the prices stated thereon. Shipping instructions will be issued and payment will be made by the Quartermaster, Marine Corps, Washington, D. C." This modification was received by plaintiff on September 12, 1918. On October 14, 1918, another modification of the original order was issued from the Bureau of Supplies and Accounts, addressed to plaintiff and duly received by it, in the form of a letter which stated that said Navy order was modified to provide for the delivery and acceptance of certain packages of cigarettes at stated provisional prices, namely "Fatima" brand cigarettes and "Piedmont" brand cigarettes, and that the modification would not have any bearing on the cigarettes already shipped in accordance with the original Navy order. The original of the letter was to be signed and returned to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C. At the bottom of said letter was written: "Navy order N-4128 is hereby accepted as modified above." This is signed by the plaintiff by its vice president and duly witnessed.

V

On or about the 22d of November, 1918, a further modification of Navy order N-4128 was issued out of the Bureau [fol. 34] of Supplies and Accounts, addressed to plaintiff,

stating that the said order was modified to provide for delivery of the following additional quantities of tobacco, more or less, as required during the period from December 1, 1918, to February 28, 1919, namely: 75,000 plugs "Star" chewing tobacco, 400,000 packages "Chesterfield" cigarettes, 2,000,000 packages "Piedmont" cigarettes, and 1,000,000 packages "Fatima" cigarettes, and adding: "The above quantities are estimated only and shipment is to be made only on receipt of order from Officer-in-Charge, Fleet Supply Base, South Brooklyn," and that all conditions stipulated in the original Navy order or any modification authorized heretofore were likewise applicable to this modification. It was requested that the original letter modifying this Navy order be signed and returned, and the same was returned as follows: "Navy order N-4128, as modified above, is hereby accepted." (Signed by the plaintiff by its vice president and witnessed.)

VI

The plaintiff furnished under said order and modifications thereof and delivered at various dates between and including September 9, 1918, and November 23, 1918, to the Navy Department, and between the dates of September 30, 1918, and November 22, 1918, delivered to the Marine Corps large quantities of the different brands of tobacco products called for by said order and modifications thereof, which, at the provisional prices stated in said order and modifications, amounted to the sum of \$423,893.96 and was paid at said prices for the same between the dates of September 9 and November 23, 1918. The prices at which the said tobacco products were invoiced by plaintiff when the shipments were made amounted in the aggregate to \$483,504.30, and said sum was the fair and reasonable value of said products. An itemized statement of the date of invoice, numbers and amount, appears in claimant's Exhibit E to its petition, which is here referred to and made a part of this finding by reference. The difference between the reasonable value of the said products and the amount that plaintiff has been paid therefor is the sum of \$59,610.34.

On or about the 20th day of February, 1919, plaintiff received a letter from the Navy Department canceling the

original Navy order N-4128 as modified, and no further orders or deliveries were made after that.

VII

On or about the 4th day of December, 1920, the Bureau of Supplies and Accounts addressed a communication to plaintiff, which received the same, as follows:

"Based on the Federal Trade Commission's report, and with the concurrence of the Army and Marine Corps, the Navy has established the following final prices for tobacco required under Navy Order N-4128, and this Navy Order is hereby modified to apply under the terms and conditions of subparagraph A thereon, sub-paragraph B being eliminated. (Here follows names of the different tobacco products and the final price.)

"The above final prices are all f. o. b. factory. For any shipment on which freight was paid by the company, credit for the actual amount will be allowed by the Navy on pre-[fol. 35] entation of properly substantiated invoices. These final prices have been determined on a basis of cost plus a reasonable return on investment. In determining costs, the cost of leaf tobacco has been computed at the average price of stock on hand, all selling expense and various minor items, such as donations, excess profits taxes, etc., being eliminated. Profit on the above cost of production has been allowed to permit of a return of 10 per cent on capital investment, including common and preferred stock but eliminating outside investments and intangibles, such as good will, etc.

"On this basis the records of the Navy show the account of the Liggett & Myers Tobacco Company under this Navy Order to stand as follows: [Here follows an itemized statement of the quantity delivered to the Navy and Marine Corps, provisional price paid, total amount paid, price now fixed, and total; these figures result in a balance due the Navy of about \$5,000.]

"If the deliveries stated in above tabulation do not agree with deliveries shown by the company's records, it is requested that the Navy be advised in order that all questions of fact in this respect may be reconciled.

"From the amount of \$4,968.44, which is the amount due the Navy on deliveries made to the Navy less the

amount due the company on deliveries made to the Marine Corps, is to be deducted any freight prepaid by the company. Check for the balance should be mailed to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C. together with the original of this letter signed as satisfactory or not satisfactory in the spaces provided below.

"If the final prices herein fixed as just compensation are not satisfactory, claim should be made for the additional amount desired in the manner prescribed by law as quoted in the original Navy order."

VIII

On the receipt of this letter the plaintiff addressed a letter to the Paymaster General of the Navy under date of December 7, 1920, as follows:

"We beg to acknowledge receipt of your letter of December 4—Subject Final Price Determination, Reference Navy Order N-4128, dated August 26, 1918.

"The settlement which you propose on account of our claim against the Navy Department for the balance due us is unsatisfactory, and cannot be accepted.

"We should be pleased for you to send us at your earliest convenience a statement in detail, giving the costs of each brand and each style of packing as determined by you, and also your method of determining the profit on each brand and each style of packing. Your prompt attention will be greatly appreciated."

Conclusion of Law

Upon the foregoing special findings of fact, which are included in the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of \$59,610.34.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of fifty-nine thousand six hundred ten dollars and thirty-four cents (\$59,610.34).

[fol. 36]

OPINION

CAMPBELL, Chief Justice, delivered the opinion of the court:

It is conceded by the Government that the plaintiff is entitled to payment for its tobacco products at the prices stated in its invoices of the same after crediting payments already made, although they are larger than the provisional prices stated in the Navy order. The one question for decision is whether plaintiff is entitled to interest upon this balance, admittedly due. The plaintiff contends that it should "recover interest as a part of the measure of just compensation guaranteed by the fifth amendment," because it claims that its tobacco products were taken or requisitioned in virtue of the act of March 4, 1917, 39 Stat. 1193, and the act of June 15, 1917, 40 Stat. 182.

It is to be observed at the outset that the statute, section 177, Judicial Code, provides that no interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims unless upon a contract expressly stipulating for the payment of interest. Amendments to this section authorize the allowance of interest in judgments for taxes erroneously or illegally assessed or collected. Revenue act of 1921, 42 Stat. 316. A claim for interest was accordingly denied where property was taken by the United States without the institution of condemnation proceedings. See *North American Transportation & Trading Co. case*, 253 U. S. 330. The taking in such case implies a promise to pay and the right of action in this court is based upon this implied contract, *Great Falls Mfg. Co. case*, 112 U. S. 645, but is not founded on the fifth amendment. *North American Transp. Co. case*, *supra*; *Klebe case*, 263 U. S. 188, 191. Nor is it to be overlooked that the liability of the United States for interest is not merely limited by section 177, but does not exist at all in the absence of statutory authority to allow interest, unless an exception is to be found in cases to be referred to later on.

It is settled upon grounds of public convenience that "interest is not to be awarded against a sovereign government unless its consent to pay interest has been manifested by an act of its legislature or by a lawful contract of its executive officers." See *United States v. North Carolina*, 136 U.

S. 211, 216; *Sherman case*, 98 U. S. 565, 567; *Angarica v. Bayard*, 127 U. S. 251, 260. This common-law rule exempting the United States from liability for interest has been adopted by Congress in section 177, Judicial Code. See *North American Transportation & Trading Co. case*, *supra* (p. 336). In consenting that the Government may be sued in the Court of Claims the Congress can place such conditions as it sees fit upon the exercise of the privilege or upon the authority of the court. A party availing himself of it accepts all the terms and limitations of the statute that authorizes the suit. *McElrath case*, 102 U. S. 426, 440. If even purely formal conditions be attached to the Government's consent to be sued those conditions must be complied with. *Rock Island, Arkansas & Louisiana Railroad Co. case*, 254 U. S. 141, 143; 54 C. Cls. 22. This section 177 is taken from the act of March 3, 1863, 12 Stat. 765, which is the first act conferring power on the Court of Claims to render final judgments from which appeals would lie. Prior to that time the original act establishing the court (act of February [fol. 37] 24, 1855, 10 Stat. 612) had conferred power to hear and determine claims and report its action to Congress.

Provision is made in the act of March 3, 1863, for interest upon judgments appealed from by the Government and affirmed by the Supreme Court of the United States, and then follows a proviso in section 7 of the act to the effect that no interest shall be allowed on any claim up to the time of the rendition of judgment "unless the contract expressly stipulates for the payment of interest." It thus appears that the same act which authorized judgments and appeals excludes in terms any right to include interest in the judgment, and therefore that not only does the general rule of law prevent the allowance of interest against the United States, but the statute conferring power to render judgments forbids such allowance where interest is not expressly stipulated for in the contract. But there are provisions in a number of statutes enacted during the period of the World War conferring jurisdiction upon this court to ascertain the value of property taken by the Government where the owner is dissatisfied with the action of the President or other authorized agency designated to determine the just compensation which the statutes in such cases declare shall be made to the owner.

In action brought here in virtue of these acts the rule of law and section 177 adverted to are not applicable. They come here and the court proceeds in them because of the particular statute under which the property is authorized to be taken and by which provision is made for the determination of just compensation. In that class of cases "the owner's right does not depend on contract, express or implied." *Seaboard Air Line Ry. case*, 261 U. S. 299, 304. The suit in this court is a part of the authorized procedure initiated by the United States for the condemnation of the property. See *Seaboard Air Line Ry. case*, *supra*. In the case just cited it appeared that the property was taken under section 10 of the Lever Act, and it was therefore not within the jurisdiction of the Court of Claims. But in the later case of *Brooks-Scanlon Corporation*, 265 U. S. 106, appealed from this court the claim was predicated upon a requisition or taking, exercised under the act of June 15, 1917, 40 Stat. 182, which directs that just compensation shall be made, to be determined by the President or by some agency to whom he may delegate the power. If the amount so determined by the President is unsatisfactory to the person entitled to receive the same the act provides that such person is to be paid 75 per cent of the amount so determined and "shall be entitled to sue the United States to recover such further sum as added to said 75 per cent will make up such amount as will be just compensation therefor in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code." Adopting the rule laid down in the *Seaboard Air Line Ry. case* upon the question of interest the court in this *Brooks-Scanlon Corp. case*, say: "And, if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added."

When in conformity to the statute suit is brought in the Court of Claims by a party dissatisfied with the President's determination the court is to ascertain the "just compensation" which the party entitled should receive. There is nothing in the act which forbids the President taking account of the delay in payment and finding that the owner should be allowed such additional sum as will produce the full equivalent of such value paid contemporaneously, and

the suit authorized in this court being a part of the plan for awarding this just compensation is in effect a continuation of the proceeding initiated by the United States for the condemnation of the property. See *Seaboard Air Line Ry. case*, *supra*. To read into the act authorizing this procedure the provision of section 177 might be to impair the very purpose of the act—the securing of just compensation to the person whose property has been taken. While the court is not authorized to include interest on its judgments in the cases coming under its general jurisdiction, it is authorized to include interest in cases brought here properly as part of the procedure for condemnation initiated by the Government. *Brooks-Scanlon Corp. case*, *supra*.

In the instant case there was no taking or requisition by the Government of plaintiff's property. The so-called requisition order was nothing more than an offer by the Navy Department to buy tobacco products to be manufactured and delivered at subsequent dates, which order was accepted by the plaintiff. Certain unit prices were stated in the order as being those that would be paid until by a later determination a reasonable and just price would be determined upon, the plaintiff in any event being "assured of a reasonable profit under this order." The products were furnished and the plaintiff was systematically paid these unit prices. It invoiced the goods at a different price, which produces the difference here sued for and to which admittedly it is entitled as being the fair and reasonable value of the tobaccos delivered. Plaintiff, however, now claims interest in addition to this principal sum. In identically the same kind of cases no interest has been allowed. See *R. J. Reynolds Tobacco Co. case*, 60 C. Cls. 328. *American Tobacco Co. case*, 58 C. Cls. 717. Plaintiff's right to sue in this case must be based upon section 145, Judicial Code, and the court can not ignore the statute already adverted to, which forbids the allowance of interest.

The facts furnish no support for the contention that the tobacco products were requisitioned or that the order in question was obligatory. If it had been obligatory there was no necessity for its acceptance. *American Smelting Co. case*, 259 U. S. 75, 79; 55 C. Cls. 466, 471. But it was accepted, and thereby the plaintiff expressly contracted to furnish the products ordered at a price which would later

be determined—not alone by the paymaster of the Navy, but by agreement if the parties should agree. Upon their failure to agree the right to sue upon the contract is given by section 145. See Federal Sugar Ref. Co. case, 60 C. Cls. 184, 197; Herrman case, 57 C. Cls. 96; Consolidation Coal Co. case, 60 C. Cls. 608, 621; Bogert case, 2 C. Cls. 159. The order states that pursuant to the provisions of the naval appropriation act of March 4, 1917, and the urgent deficiency act of June 15, 1917, and “acting under the direction of the President” it is placed with plaintiff “under the conditions stated in subparagraph (b)” and that compliance with the order is obligatory. It speaks of “material” needed by the Navy, but manifestly the order can not extend the authority conferred by the acts mentioned. It does not appear in this case that the President assigned his powers under the act of June 15, but we know [fol. 39] from other cases that he did authorize the Secretary of the Navy to act. Assuming, for the purposes of this case, such authority in the secretary, it by no means follows that the great powers conferred by these acts were extended to the paymaster of the Navy and by him to orders issued by the quartermaster, Marine Corps, as the original order or one of its modifications directs.

It is to be observed that the act of March 4, 1917, 39 Stat. 1192, defines the “war material” concerning which an order could be placed and likewise provides the course that may be pursued in case of refusal or failure to comply with the authorized order. This at least implies that the order could be refused, in which case the President could take possession of the “factory” or any part of it and use the same for the production of the ships or war material. Subparagraph “fourth” authorizing the requisition or taking over for use by the Government of any factory or part of it is limited to the period ending March 1, 1918. This act does not contain the provision that does appear in the act of June 15, 1917, whereby the President may exercise the power and authority thereby vested in him through such agency or agencies as he should determine from time to time. 40 Stat. 183. There is a provision in the act of March 4 that where “war material” is requisitioned or taken over, the President shall determine just compensation for it, and if the party entitled be dissatisfied with the amount so determined he shall be paid 50 per cent of the amount so

determined by the President and can sue for an additional sum in the Court of Claims. But the order in question does not proceed upon the theory of the payment of 50 per cent when determined, nor of 75 per cent as mentioned in the act of June 15. It proceeds upon the theory of the payment of a stated provisional price which might have been accepted and been acceptable to both parties. As a matter of fact the plaintiff was paid as and when deliveries were made largely more than 75 per cent of the invoice prices upon which its bills were based.

If there were reasonably some question as to whether the order should be treated as a requisition or the taking of property of the citizen on the one hand, or a contract for its purchase on the other hand, it would seem that it should be treated as a contract because the Government is not to be presumed to exercise the harsher method of eminent domain when the same results can be gained by the ordinary methods of contract. *Bogert's case*, 2 C. Cls. 160, 164. It would be going much farther than the court feels justified in going to hold that an order for tobacco products to be made and delivered in the future is a taking or a requisition of such products. It remains to be said, in view of the references to it in plaintiff's brief, that the facts as stated in the findings in the *American Tobacco Co. case*, *supra*, were stipulated. No question arose as to interest and it was conceded that the court should determine the amount due for the tobaccos furnished. When, however, the court is asked to make findings or deductions as a basis for a liability that may not exist it requires evidence of the essential facts and does not feel bound by stipulated deductions in the absence of proof.

The court will give judgment for the fair and reasonable value of the tobacco products, but will not allow interest. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 40] V. JUDGMENT—February 15, 1926

At a Court of Claims held in the City of Washington on the 15th day of February, A. D., 1926, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the plaintiff, and do order and adjudge that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of Fifty-nine thousand six hundred and ten dollars and thirty-four cents (\$59,610.34).

By the Court.

[fol. 41] Certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 31,893. Court of Claims. Term No. 1170. Liggett & Myers Tobacco Company, petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed May 3rd, 1926. File No. 31,893.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1926

No. 362

LIGGETT AND MYERS TOBACCO COMPANY, Petitioner,

vs.

THE UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed October 11, 1926

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3229)



FILE COPY

Office Supreme Court, U. S.
F I L E D

MAY 19 1926

WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. ~~100~~ 362.

LIGGETT & MYERS TOBACCO COMPANY,
PETITIONER,

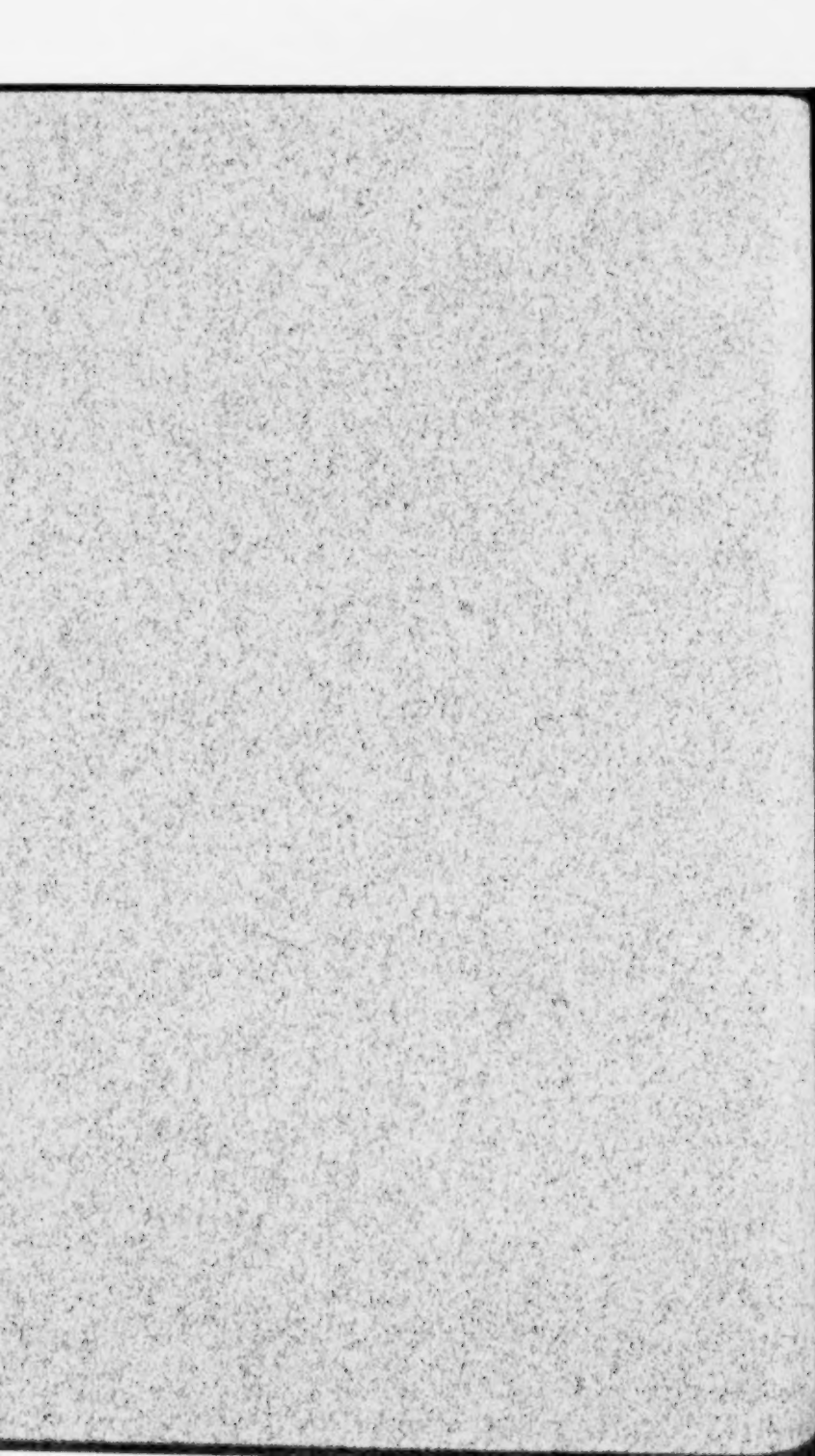
vs.

THE UNITED STATES.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI TO THE COURT OF CLAIMS.**

HUMPHREYS & DAY,
Counsel for Petitioner.

✓ **ADRIAN C. HUMPHREYS,**
✓ **CHESTER A. GWINN,**
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 1170.

LIGGETT & MYERS TOBACCO COMPANY,
PETITIONER,

vs.

THE UNITED STATES.

**BRIEF AND ARGUMENT IN SUPPORT OF
PETITION.**

A.

Foreword.

The sole question to be argued in this case is whether petitioner is entitled to recover interest as a part of the measure of just compensation guaranteed to it by the Fifth Amendment of the Constitution of the United States and as provided in the acts of Congress approved March 4, 1917 (39 Stat., 1195), and June 15,

1917 (40 Stat., 182), under which the requisition order was issued by the Navy Department and which provides that the President "shall make just compensation" for any materials requisitioned thereunder.

The Court of Claims entered judgment in favor of petitioner in the principal amount claimed, which represented the fair market value of the materials requisitioned at the time of their taking, but refused to allow interest on said amount, on the ground that there was a contract between the petitioner and the Government which brought the case within the provisions of section 177 of the Judicial Code of the United States.

Petitioner contended in the Court of Claims that its property was requisitioned by an *obligatory order* issued under the authority of the President of the United States, conferred by the acts of Congress aforesaid, and that interest from the date of taking to the date of judgment was recoverable as a part of the measure of just compensation guaranteed by the Fifth Amendment and relied upon the decisions of this Court in the cases of Seaboard Air Line Ry. Co. *vs.* United States, 261 U. S., 299; 43 Sup. Ct. Rep., 354; Brooks-Scanlon Corp. *vs.* United States, 265 U. S., 106; 44 Sup. Ct. Rep., 471, and other decisions of this Court.

The order issued by the Navy Department (Navy Order, N-4128) is printed in the record (R., 11). It speaks for itself. It provided a line on which petitioner was required to and did sign. Such signing under the requirements of the order constituted an

acknowledgment rather than a legal "acceptance" of an "offer." If the order constituted a *requisition*, it was a requisition regardless of whether petitioner signed on the dotted line or not.

The Court of Claims held that there was no requisition by the Government of plaintiff's property. The court took judicial notice of the fact that the President did authorize the Secretary of the Navy to act for him under the above-mentioned statutes providing for the requisitioning of materials, etc., but held that the power was not exercised in this case (R., 38).

We think it unnecessary to go beyond the terms of the order ~~and~~ the court's findings of facts (R., 28) to determine this question. However, there was testimony by Mr. C. W. Toms, vice-president of the petitioner, showing that the petitioner regarded the order as obligatory and filled it relying upon the Government to pay just compensation for the property requisitioned.

The Court of Claims had jurisdiction to determine "just compensation" in this case under the specific provisions of the acts of Congress under which the property was requisitioned. Its jurisdiction did not depend upon contract, either expressed or implied.

B.

The Materials were Requisitioned by the Government.

The facts of the case show that the materials were requisitioned by an obligatory order with which the claimant was forced to comply. Interest is, therefore,

claimed as a proper addition to the fair market value of the goods at the time they were taken to "produce full equivalent of such value paid contemporaneously." *Brooks-Scanlon vs. United States, supra.*

There was no contract between the petitioner and the Government in this case, because the meeting of the minds, which is the first essential of a valid contract, was not present. The order stated that "compliance with this order is obligatory and no commercial orders shall be allowed by you to interfere with delivery herein provided for." The order further stated that it was placed under subparagraph (b) of said order, subparagraph (a) being eliminated.

Regardless of the statement that the order was placed under subparagraph (b), the Navy Department, in its letter of December 4, 1920, purporting to establish prices for the materials furnished by petitioner, stated that Navy Order N-4128 "is hereby modified to apply under the terms and conditions of subparagraph (a) thereof, subparagraph (b) being eliminated." This modification was never accepted by the petitioner, but, on the contrary, was expressly rejected (R., 35).

It is evident from the facts of record and as found by the Court of Claims that when the Navy Department issued the order it had no idea that it was making a contract, and when the claimant received the order it had no other idea than that it was a requisition which it was required by law and its duty as a citizen to honor without protest or attempted evasion, trusting to the justice of its Government for just compensation.

Nothing is better settled in the law of contracts than that

“Wherever the parties are not at arm’s length, but one is in a position to dictate, the courts will treat agreements which are influenced by threats of injury to, or withholding of property, as made under duress” (Lawson on Contracts, Sec. 261, and cases cited in 9 Cyc., 451).

In *Seaboard Air Line Ry. Co. et al. vs. United States*, 261 U. S., 299, 304-305; 43 Sup. Ct. Rep., 354, Mr. Justice Butler said:

“The owner’s right does not depend on contract, express or implied. A promise to pay is not necessary. None is alleged. This suit is a part of the authorized procedure initiated by the United States for the condemnation of the land. The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. * * * The only question here is whether payment at a subsequent date of the value of the land as of the date of taking possession is sufficient to constitute just compensation.”

In the case at bar, as in the *Seaboard Air Ry. Co.* case, the only question is whether payment of the value of the property as of the date of taking is sufficient to constitute just compensation in a case where payment is resisted by the Government and is not finally made until years after the taking.

Under decisions of this Court petitioner is entitled to interest at a reasonable rate to make up the full measure of just compensation required by the Constitution of the United States and the statutes aforesaid, in order to place it in as favorable position as it would have been had compensation been paid contemporaneously with the taking.

Payment has been withheld from petitioner since the last delivery made under the above-mentioned order, on January 23, 1919, and petitioner is entitled to such interest as will place it in approximately the same financial position as other companies similarly situated, who have already received their compensation and who have not been compelled to resort to years of supplication in the executive department and litigation in the courts of the Government for the recovery of that which is admittedly due.

C.

“Just Compensation” Includes Interest when Payment is Not Made Contemporaneously with the Taking of the Property.

What is just compensation is a judicial question and is not left to the determination of any executive department. This Court has repeatedly held that if the compensation is paid contemporaneously with the taking, just compensation means the fair market value of the property.

“There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent

for the property taken" (Monongahela Navigation Co. *vs.* U. S., 148 U. S., 312; 37 L. Ed., 463).

The courts alone can determine what is just compensation.

"The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be, or to prescribe any binding rule in that regard" (U. S. *vs.* New River Collieries Co., 262 U. S., 341).

As stated by this Court in Seaboard Air Line Ry. Co. *vs.* United States, 261 U. S., 304, citing Monongahela Navigation Co. *vs.* U. S., 148 U. S., 312, 327:

"Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function."

It might be properly added, in the language of Mr. Justice Brewer in the Monongahela case (13 Sup. Ct. Rep., 633), that

"the question of just compensation is not determined by the value to the Government which takes, but the value to the individual from whom the property is taken."

This makes it important to determine, not alone the amount the Government would have been compelled to pay for the materials taken, but how much the claimant is out of pocket as a result of the taking and failure of the Government to pay at the time of the

taking. Any correct idea of "just compensation" requires that the claimant be fully compensated for his losses as a result of the taking.

This Court, in *New River Collieries Company vs. United States*, *supra*, approved the rule followed by the circuit court of appeals in its decision of the question, which was stated as follows:

"If it be an article commonly traded in on a market, and it is shown that, at the time and place it was taken, there was a market in which like articles in volume were openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its requisition" (262 U. S., 345).

The foregoing expressions of opinion by this Court relate to compensation paid contemporaneously with the taking of the property.

The claimant in the case at bar asks for compensation based upon an invoice price which was 5 per cent less than the prevailing market price to its most-favored customers, together with interest on unpaid balances, in order to place it in as good a position as it would have been if its goods had not been requisitioned by the Government, but had been sold in open market.

What would have been just compensation if paid contemporaneously is not necessarily just compensation when payment is not made contemporaneously. It was definitely settled by the decision of the Supreme Court in the case of *Seaboard Air Line Railway Company vs. United States*, *supra*, that section

177 of the Judicial Code has no application to a claim for just compensation for the taking of property. The Court said :

“The requirements that just compensation shall be paid is comprehensive, and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.” *Interest at a proper rate is a good measure by which to ascertain the amount so to be added* (underscoring ours), (43 Sup. Ct. Rep., 356).

That interest from the date of the taking is properly allowable was also held in *United States vs. Benedict*, 261 U. S., 294; 43 Sup. Ct. Rep., 354; *United States vs. Rogers*, 255 U. S., 163; 41 Sup. Ct. Rep., 281; *Brooks-Scanlon Corporation vs. United States*, 265 U. S., 106; 44 Sup. Ct. Rep., 471.

In the case of *United States vs. Rogers et al.*, *supra*, the Court held that in assessing the compensation for property taken by the United States for public use the allowance of interest on the value of the property taken at the rate of 6 per cent, which was the rate prevailing in the State, from the date of the taking until the deposit of the money in court was a proper allowance as a part of the compensation.

In the case of Seaboard Air Line Railway Company *et al. vs. United States, supra*, the Court held that where the United States requisitioned property for war purposes and took possession before ascertaining or paying compensation the owner is not limited to the value of the property at the time of taking, but is entitled to such additions as will produce the full equivalent of that value paid contemporaneously with the taking, and the allowance of interest on the value found by the jury at the legal rate established by the State in which the property was situated, was a fair and reasonable method of ascertaining that element of just compensation.

In Brooks-Scanlon Corporation *vs. United States, supra*, the Court, citing the foregoing decisions, said:

“* * * and, if the taking precedes the payment of compensation, the owner is entitled to such additions to the value at the time of taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added” (44 Sup. Ct. Rep., 474).

D.

The Provision of the Fifth Amendment of the Constitution of the United States Requiring that Just Compensation be Paid for Private Property Taken for Public Use Should be Liberally Construed in Favor of the Claimant.

No better statement of the foregoing principle can be found than that of Mr. Justice Bradley in *Boyd vs.*

United States, 116 U. S., 616, 635; 6 Sup. Ct. Rep., 524, quoted by Mr. Justice Brewer in *Monongahela Navigation Co. vs. United States*, 148 U. S., 312; 13 Sup. Ct. Rep., 622, 626, as follows:

“Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.”

To the foregoing language of Mr. Justice Bradley, Mr. Justice Brewer added the following:

“The language used in the fifth amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right of power in the Government; the last (the one in point here) being: ‘Nor shall private property be taken for public use without just compensation.’ The noun ‘compensation,’ standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages; the former being the equivalent for the injury done, and the latter imposed by

way of punishment. So that, if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken; * * *'' (Monongahela Navigation Co. *vs.* United States, 13 Sup. Ct. Rep., 626).

Conclusion.

On authority of Seaboard Air Line Ry. Co. *vs.* United States, 261 U. S., 299; 43 Sup. Ct. Rep., 354; Brooks-Seanlon, Inc., *vs.* United States, 265 U. S., 106; 44 Sup. Ct. Rep., 471, and other decisions of this Court, the writ of certiorari should be granted in order that the necessary and proper proceedings should be had looking to the correction of the error on the part of the Court of Claims in refusing to allow interest as a part of the measure of just compensation guaranteed to the petitioner by the Constitution and statutes of the United States.

Respectfully submitted,

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CHESTER A. GWINN,
Of Counsel.

FEB 10 1927

WM. R. STANSBURY
CLERK

IN THE
Supreme Court of the United States

October Term, 1926.

No. 362.

LIGGETT & MYERS TOBACCO COMPANY,
Petitioner,

v.

THE UNITED STATES.

On Certiorari to the Court of Claims.

Brief for the Petitioner.

HUMPHREYS & DAY,
Attorneys for the Petitioner.

✓ **ADRIAN C. HUMPHREYS,**
✓ **CHESTER A. GWINN,**
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1926.

LIGGETT & MEYERS TOBACCO COMPANY,	{	No. 362
<i>Petitioner,</i>		
<i>v.</i>		
THE UNITED STATES.		

CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR PETITIONER.

OPINION BELOW.

The opinion of the Court of Claims is reported in 61 Ct. Cls. 693 and is printed in the record (R. 41).

JURISDICTION.

The judgment of the Court of Claims was entered February 15, 1926 (R. 46). The petition for writ of certiorari was filed May 3, 1926 (R. 47), under the provisions of the Act of February 13, 1925, Chap. 229, 43 Stat. 936, and was granted October 11, 1926.

THE QUESTIONS.

I. Does Section 177 of the Judicial Code, forbidding the payment of "interest" in cases in the Court of Claims until after judgment is rendered, "unless upon a contract expressly stipulating for the payment of interest," prevent the awarding, in commandeering cases, of a sum, measured by the legal rate of interest, as a part of the *just compensation* to which the citizen is entitled under the Fifth Amendment?

II. Were the tobacco products procured by the United States from petitioner obtained by the United States through the exercise of the power of eminent domain?

STATEMENT.

On August 26, 1918, the Navy Department acting for the President of the United States, under authority delegated by the President August 31, 1917, sent to the petitioner Navy Order No. N-4128 directing and requiring it to deliver at the times and places and in the manner designated therein certain quantities of tobacco and tobacco products. No prices were fixed, other than provisional prices, but petitioner was promised "reasonable and just compensation". The form and contents of Navy Order N-4128 are fully set out in the record (R. 29-37) and need not be repeated here.

The order, by its terms, was placed "pursuant to the provisions of the Acts of Congress, Naval Appropriation Act approved March 4, 1917, and the Urgent Deficiency Act approved June 15, 1917

* * * , and acting under the direction of the President of the United States."

The order by its terms was a command. It said "Compliance with this offer is *obligatory*, and no commercial orders shall be allowed by you to interfere with the delivery herein provided for."

The order (subparagraph (b)) stated that "As it is impracticable to now determine a reasonable and just compensation for the material to be delivered the fixing of the price will be subject to later determination," and petitioner was "assured of a reasonable profit under this order" and that it would be paid a price that was "just and reasonable."

The order stated that it "must be accepted and filled in any event," and that "If order is placed under subparagraph (b) original is to be signed and returned."

Since the order was placed under subparagraph (b), it was signed by the petitioner in the space provided for its signature, and returned to the Navy Department, as required by subparagraph (c) of the order. The words, "The above order is accepted subject to the conditions in subparagraph (b) above," were in the order when it was received by the petitioner and were not supplied or endorsed thereon by it.

Thereafter followed paragraphs with respect to deliveries and bills, and a statement of the number and kind of tobacco products required, together with a list of the provisional prices for the tobacco products mentioned in the said order (R. 31, 32).

On the reverse side of the printed form appeared extracts from the Acts of March 4, 1917 (c. 180, 39

Stat., 1168, 1193), and June 15, 1917 (c. 29, 40 Stat., 182) (R. 33). These extracts from the Acts of March 4, 1917 and June 15, 1917, contained the provisions of said Acts authorizing and empowering the President "in addition to all other existing provisions of law," to requisition supplies; that "Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person;" and also that "the United States" shall make *just compensation* therefor" and if the amount determined by the President as just compensation "is unsatisfactory to the person entitled to receive the same, such person * * * shall be entitled to sue the United States to recover such further sum * * * as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

The pertinent provisions of the Act of June 3, 1916, c. 134, p. 120,, 39 Stat. 213-214 (U. S. Comp. Stats. 1918, Sec. 3115g), the Act of March 4, 1917, c. 180, 39 Stat. 1168, 1193, (U. S. Comp. Stats. 1918, Sec. 3115-1/16 b c), the Act of June 15, 1917, c. 29, 40 Stat. 182 (U. S. Comp. Stats. 1918, Sec. 3115-1/16 d), and Sections 145 and 177 of the Judicial Code are printed in the appendix to this brief.

There were three "modifications" of the above-described order, dated September 9, 1918 (R. 37), October 14, 1918 (R. 37), and November 22, 1918 (R. 37, 38), for the purpose only of requisitioning additional supplies. These orders were signed and returned by the petitioner, in accordance with the in-

structions contained therein, in the same manner as the original order (R. 37, 38).

Petitioner, having acknowledged, or "accepted," the orders as aforesaid proceeded promptly to comply with them according to their terms, invoicing the tobacco and tobacco products furnished thereunder at its lowest list prices, less five per cent, amounting in the aggregate to \$483,504.30 (R. 38). At the provisional prices stated in the order and modifications the aggregate value of the supplies so furnished amounted to \$423,893.96, which latter amount was paid to the petitioner between the dates of September 9 and November 23, 1918 (R. 38).

The difference between the amount claimed by the petitioner, i. e. \$483,504.30, and the provisional prices paid by the United States, i. e. \$423,893.96, being \$59,610.34, was withheld from the petitioner; and on February 20, 1919, the Navy Department notified the petitioner that the order was cancelled (R. 38, 39).

After the letter of February 20, 1919, cancelling the order, the Navy Department, on December 4, 1920, sent a letter to the petitioner purporting to amend the order so as to make it "apply under the terms and conditions of subparagraph A thereon, subparagraph B being eliminated," and purporting to fix prices for the supplies furnished by petitioner, which prices so fixed were less than the provisional prices stated in the order, and claiming a refund from the petitioner in the amount of \$4,968.44 (R. 39).

Said letter of December 4, 1920, specifically stated that the prices so fixed were "as just compensation" (R. 40).

Petitioner refused to accept the prices fixed by the Navy Department (R. 40), and after nearly four years spent in the prosecution of its claim before the Secretary of the Navy for just compensation for the property requisitioned as aforesaid, and having been denied relief, it brought this suit in the Court of Claims on August 4, 1924 (R. 1).

Petitioner's claim in the Court of Claims was for *just compensation* under the Fifth Amendment and the Acts of Congress approved March 4, 1917, and June 15, 1917, and it claimed the difference between the market price of the supplies when furnished and the provisional prices paid by the United States, to wit, \$59,003.30 together with interest thereon at the rate of six per cent per annum to make up the full measure of just compensation to which petitioner is entitled under the Constitution and laws of the United States (R. 8).

The Court of Claims found that the prices claimed by the petitioner were "fair and reasonable" (R. 38), and entered judgment for the petitioner in the amount of \$59,610.34, but refused to allow any compensation for the damage done to the petitioner through the refusal of the United States to pay the fair and reasonable value of the supplies at the time they were taken by the United States, basing its refusal on Section 177 of the Judicial Code.

Petitioner now appeals to this Honorable Court to remedy the injustice done by the Court of Claims in so refusing to award it the full measure of just compensation to which it is entitled under the Constitution and laws of the United States and the decisions of this Court.

ARGUMENT.

I.

Where private property is taken by the United States for public use before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking but he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added.

Seaboard Air Line Railway Company v. United States, 261 U. S. 299, 43 Sup. Ct. Rep. 355, 356.

Brooks-Scanlon Corp. v. United States, 265 U. S. 106; 44 Sup. Ct. Rep. 471;

United States v. Benedict, 261, U. S. 294; 43 Sup. Ct. Rep. 354;

United States v. Rogers, 255 U. S. 163; 41 Sup. Ct. Rep. 281.

II.

Petitioner's property was taken by the United States through the exercise of its right of eminent domain.

Fifth Amendment of the Constitution;

Act of June 3, 1916, (Ch. 134, 39 Stat. 213, 214);

Act of March 4, 1917, (Ch. 180, 39 Stat. 1168 1193);

Act of June 15, 1917, (Ch. 29, 40 Stat. 182, 183);
Sections 145 and 177, Judicial Code;
Lawson on Contracts, Section 261;
American Smelting & Refining Co. v. United
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Ct. Cls. 108;
Seaboard Air Line Railway Co. v. United
States, supra;
Brooks-Scanlon Corp. v. United States, supra;

III.

Since Congress has no power to limit the right to just compensation guaranteed by the Fifth Amendment, Section 177 of the Judicial Code does not apply to this case.

Brooks-Scanlon Corp. v. United States, supra;
United States v. Benedict, supra;
Seaboard Air Line Railway Company v. United
States, supra;
Monongahela Navigation Company v. United
States, 148 U. S. 312; 13 Sup. Ct. Rep. 622.
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National Defense Act of June 3, 1916.

I.

Where private property is taken by the United States for public use before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking but he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added.

Argument in support of this point is unnecessary. It is stated in practically the identical language of this Court in *Seaboard Air Line Railway Company v. United States*, 43 Sup. Ct. Rep. 354, 356, and is supported by the Court's decision in that case and its decisions in,

Brooks-Scanlon Corp v. United States, supra;
United States v. Benedict, supra; and
United States v. Rogers, supra.

These decisions limit our questions here to whether petitioner's property was taken by the United States through the exercise of its right of eminent domain, and, if so, whether there is any bar to an award by the Court of Claims of full and just compensation for the property so taken.

II.

Petitioner's property was taken by the United States through the exercise of its right of eminent domain.

There were no negotiations of any kind between the petitioner and the United States upon which a contract might be based or from which one might be implied. There were none of the usual discussions which ordinarily precede an agreement or contract to purchase or sell. There were no questions as to price, quantity, time or place of delivery, or terms of payment.

It was not the intention of the Navy Department to enter into an agreement. On the contrary, it relied explicitly upon the authority conferred by the Acts of Congress of March 4, 1917, and June 15, 1917, to command the petitioner to supply the required materials in the amounts and at the times and places specified by it. Not only does the order (R. 8) quote excerpts of said Acts of Congress to show that Congress had empowered the President to *place orders* which should be *obligatory*, but its phraseology follows that of the Act so as to make it doubly sure that the goods were being requisitioned and that there could be no escape from the fulfillment of the order.

The President did not require the authority contained in the Acts of March 4, 1917, and June 15, 1917, *to enter into a contract* for supplies needed by the Navy. Nor can there be a contract where the power of Government was invoked as it was in this case to coerce and compel the petitioner to fill its orders. It is well settled that:

“Whenever the parties are not at arm’s length, but one is in a position to dictate, the courts will treat agreements which are influenced by threats of injury to, or withholding of property, as made under duress” (Lawson on Contracts, Sec. 261, and cases cited in 9 Cyc., 451).

Is it an offer to contract when the Government says to the citizen: “Give me what I want of your goods; deliver them where I say deliver them; set aside all commercial orders, no matter at what loss, and give priority to my demands; if you do not I have power to take your plant and all your property and to fine and imprison your officers; this order is *obligatory!*”

Is “acceptance” of such an order necessary; and, if accepted, does a contract result? We think not. The order speaks for itself. It either is, or is not, a requisition, and if it is a requisition “acceptance” does not change it to something different. This Court said in *American Smelting & Refining Co. v. United States*, 42 Sup. Ct. Rep. 420, 421, that if an order is a compulsory requisition no acceptance is necessary. Of what effect then is the “acceptance”? Does it transform a compulsory requisition, based upon the power inherent in the sovereign to take private property for public use into an “offer and acceptance” and, therefore, a contract? The Court below seemed to think that it did, and thereby it was led into error.

What would have been the result if the petitioner had refused to sign the order, as required by the Navy Department? Would its rights have been different? If so, what right did it waive by signing the

order? It could not have enjoined the Government from taking its property.

Relying upon the decisions of this Court, we have no hesitancy in saying that its right to just compensation would have been no different whether it signed or refused to sign. But under the decision of the Court of Claims, in the case of *The Atlantic Refining Company v. United States*, 59 Ct. Cls. 108, petitioner's position with reference to compensation *would have been better had it refused to accept the order.*

In the case of *The Atlantic Refining Company, supra*, the plaintiff received the same kind of an order, issued pursuant to the same Acts of Congress and *refused to accept it*. The Court held that there was no contract, but a compulsory requisition and that the plaintiff was *entitled to interest* upon the market price at the time its goods were taken, to date of the judgment, to make up the full measure of just compensation. It found Section 177 of the Judicial Code no bar to such award. Why, then, the distinction in the case at bar?

The one possible point of distinction between the *Atlantic Refining Co. case, supra*, and the case at bar, is that, in the former, the plaintiff refused to "accept" the order by signing it in the space provided for that purpose, whereas, the petitioner "signed on the dotted line". Both delivered the materials requisitioned by the orders, and both refused to accept the prices fixed by the Navy Department. Both applied to the Executive Department for relief and both were dissatisfied with the measure of compensation awarded. Both sued in the Court of Claims under authority of the Acts of

March 4, 1917, and June 15, 1917, and both claimed interest on the amounts of the unpaid balances unjustly withheld by the Executive Department.

The Court of Claims held that the Atlantic Refining Company was entitled to interest under the decision of this Court in the *Seaboard Air Line case*, *supra*, by virtue of its having *refused to accept* the order, whereas, petitioner, having indicated an "acceptance" or willingness to deliver the goods in compliance with the terms of the order, protesting only the price suggested, could not claim that its goods were commandeered. Such a distinction, we insist, is contrary to law as well as to sound principles of justice and good government. In effect, the Court says that preference shall be given to the recalcitrant producer or manufacturer who defies the mandates of the President in time of war or National Emergency over he who says, "I accept, saving only the question of compensation, and will comply". Can such things be?

On no other ground than that stated above can the decision of the Court below be reconciled with its own decision in the *Atlantic Refining Company case*, *supra*, and on no other ground can we account for the Court's failure to follow the decisions of this Court in the *Brooks-Scanlon Corp.* and *Seaboard Air Line Railway Company cases*, *supra*.

The Court below cited in its opinion the decision of this Court in *American Smelting & Refining Company v. United States*, 259 U. S. 75, 42 Sup. Ct. Rep. 420, but it is not in point. In the *American Smelting Company case* there was an express contract for delivery of copper to the Government at an agreed price. The order did not even purport to be a requi-

sition; nor did it purport to have been issued under any Act of Congress authorizing the taking of private property for a public use. The Solicitor General properly distinguishes this case in his brief on the petition for certiorari, at page 8.

The case of *North American Transportation & Trading Company v. United States*, 253 U. S. 330, 40 Sup. Ct. Rep. 518, cited by the Court below, is not in point, because the suit was brought upon implied contract; and the Court of Claims had no jurisdiction of the cause except upon implied contract of the United States to pay for the land taken without condemnation proceedings. (Section 145, Judicial Code.) The same may be said of the case of *United States v. Great Falls Mfg. Company*, 112 U. S. 645, 5 Sup. Ct. Rep. 306, cited by the Court below.

The case of *Klebe, et al v. United States*, 263 U. S. 188, 44 Sup. Ct. Rep. 58, cited by the Court below, is not in point because in that case the Government took the property (steam shovels) *under a claim of title by virtue of an express contract*.

The cases of *United States v. State of North Carolina*, 136 U. S. 211, 10 Sup. Ct. Rep. 920 (re liability of a State to pay interest on its bonds after the principal has become due), and *United States, ex rel Angarica v. Bayard*, 127 U. S. 251, 8 Sup. Ct. Rep. 1156 (where only contractual relations were involved), both of which cases were cited by the Court below, are wholly inapplicable to the case at bar.

Under *exactly the same facts* as in the case at bar, the Court of Claims held in the case of *American Tobacco Co. v. United States*, 58 Ct. Cls. 717, that the order was a requisition obligatory in its terms, and that the claimant was entitled to "just compen-

sation." The question of interest was not raised in the *American Tobacco Company case*; and when it was raised by the petitioner in this case, the Court of Claims, on the same facts exactly as in the *American Tobacco Company case*, held that the goods were furnished under a contract and interest was barred by Section 177 of the Judicial Code.

If the order in this case was not a mandate of the President, we can not imagine what was lacking to make it such. It was obligatory in its terms. It referred expressly to the laws authorizing the President to requisition materials and quoted at length the provisions of such laws. It stated no price and asked no questions. It *demand*ed that it be signed and returned and that it be complied with *in any event*. If this was not sufficient to make the order a mandate, there was the Act of June 3, 1916, empowering the President to issue such obligatory orders and making non-compliance with them a felony punishable by fine and imprisonment.

We may well wonder how far, in the opinion of the Court of Claims, a citizen must persist in his refusal to comply in order to be entitled to just compensation. Can he stop short of felony or must he carry his resistance to the prison door? May his resistance be mild and equivocal or must it be determined and unequivocal? Does he forfeit his Constitutional right if he yields and delivers the goods, and must he await the arrival of the armed forces of the United States to take them from him? Absurd though these questions may appear, they are what a citizen will naturally ask if he is told that in order to obtain just compensation for property requisitioned by his Government in time of war, *he must resist the order and refuse to accept it.*

III.

Since Congress has no power to limit the right to just compensation guaranteed by the Fifth Amendment, Section 177 of the Judicial Code does not apply to this case.

This claim is "founded upon the Constitution of the United States" and a "law of Congress" and hence Section 177 of the Judicial Code is inapplicable.

Under the Fifth Amendment, if the Government takes private property for public use, it must pay just compensation. The Acts of Congress of March 4, 1917, and June 15, 1917, authorized the President to take private property for public use and to award just compensation for the property so taken. Congress must be presumed to have had the guaranty of the Fifth Amendment in mind when it enacted these laws. It must also be presumed to have known that the question of what is just compensation is a judicial question and can not be finally determined by any other department of the Government. Therefore, when it, by the same Acts, authorized dissatisfied owners to sue in the Court of Claims for just compensation it must have had in mind just compensation within the meaning of the Constitution and not as limited by Section 177 of the Judicial Code or by any other Act of Congress.

Likewise, when Congress, by the Acts of March 4, 1917, and June 15, 1917, authorized the Court of Claims to entertain suits against the United States for just compensation for materials requisitioned, it must be presumed to have been familiar with the decisions of this Court defining the meaning of "just

compensation." Consequently, Congress knew that there could be no such thing as "just compensation, subject to the limitations of Section 177 of the Judicial Code," or any other limitations, and it never intended to limit the Court's awards to anything short of just compensation.

The Act of June 15, 1917, provides that "such person * * * shall be entitled to sue the United States to recover such further sum as * * * just compensation." This is substantially the same language as was used in the Lever Act (40 Stat. 276) which (Section 10) authorized the claimant—

"to sue the United States to recover such further sum as * * * will make up * * * just compensation * * *."

In the *Seaboard Air Line case*, *supra*, this Court said:

"The owner's right does not depend upon contract, express or implied. A promise to pay is not necessary. None is alleged. This suit is part of the authorized procedure initiated by the United States for the condemnation of the land. The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation * * * . The only question here is whether payment at a subsequent date of the value of the land at the date of taking possession is sufficient to constitute just compensation." (43 Sup. Ct. Rep. 356.)

The case of *Brooks-Scanlon Corp.*, *supra*, was instituted in the Court of Claims under authority of

said Act of June 15, 1917, and neither that Court nor this Court found Section 177 a bar to the allowance of full and complete compensation in that case, but on the contrary it was specifically held that interest was allowable so as to make the measure of just compensation equivalent to market value paid contemporaneously with the taking.

These cases are wholly unlike *United States v. North American, etc., Co.*, 253 U. S. 330, which was based on an implied promise of the United States to pay for property appropriated by it. Of that case the Court, in the *Seaboard Air Line* case said:

“That was a suit in the Court of Claims, based on an implied promise of the United States to pay for property appropriated by it
* * *.” (43 Sup. Ct. Rep. 356.)

The only jurisdiction the Court of Claims had to grant relief in the *North American, etc., Co.*, case, was to be found in Section 145 of the Judicial Code. In the case at bar it has jurisdiction to award just compensation under the provisions of the Act of June 15, 1917.

Since the claim in the case at bar is not based upon an implied promise, but is founded upon the Constitution of the United States and a law of Congress in pursuance thereof, Section 177 of the Judicial Code is inapplicable and the petitioner is entitled to the full measure of just compensation guaranteed by the Constitution, which must, necessarily include interest on unpaid balances in order to compensate petitioner as fully as though market value had been paid at the time the property was taken.

Seaboard Air Line Railway Company v. United States, 261 U. S. 299, 304, 43 Sup. Ct. Rep. 355;

Brooks-Scanlon Corp. v. United States, 265 U. S. 106, 44 Sup. Ct. Rep. 471;

United States v. Benedict, 261 U. S. 294, 43 Sup. Ct. Rep. 354;

United States v. Rogers, 255 U. S. 163, 41 Sup. Ct. Rep. 281.

As stated in the opinion of this Court in the *Seaboard Air Line* case—

“Just compensation is provided for by the Constitution, and the right to it can not be taken away by statute.”

Therefore, had Congress set about with deliberate intent to limit the awards of the Courts to less than just compensation, its act would have been unconstitutional, (*United States v. New York*, 160 U. S. 598, 622). How then can a statute (Section 177 of the Judicial Code) which was obviously not so intended, be construed as limiting the awards of the Court of Claims in commandeering cases to less than just compensation?

Since any effort to deny or limit the right to full just compensation, including interest as a part of the measure or as compensation for delay in payment, would be beyond the power of Congress, it should be presumed that Congress had no such intention. (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 34 Sup. Ct. Rep. 359.)

CONCLUSION

If, in our argument, we have touched but lightly upon important principles of Constitutional law involved in this case it is because we feel that every principle for which we contend has been correctly decided by this Court in—

Monongahela Navigation Co. v. United States,
148 U. S. 312, 13 Sup. Ct. Rep. 622, 626;
Seaboard Air Line Ry. Co. v. United States,
supra;
Brooks-Scanlon Corp. v. United States, *supra*;

and we are relying with confidence upon the Court's decision in those cases.

The situation presented in this case calls for the annunciation of no new principles of constitutional construction, but for strict adherence to the principles previously announced by this Court, and departed from by the Court below. Such departures are dangerous, and this Court alone has power to prevent them.

As stated by Mr. Justice Bradley in *Boyd v. United States*, 116 U. S. 616, 635; 6 Sup. Ct. Rep. 524, quoted by Mr. Justice Brewer in *Monongahela Navigation Company v. United States*, *supra*.,

“Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half

their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

It is respectfully submitted that the judgment should include interest at a fair rate to make up the full measure of just compensation to which the petitioner is entitled under the Constitution, and that the case should be remanded to the Court of Claims with directions so to revise its judgment.

HUMPHREYS & DAY,
Attorneys for the Petitioner.

ADRIAN C. HUMPHREYS,
CHESTER A. GWINN,
Of Counsel.

APPENDIX.

The pertinent portions of the Act of June 3, 1916, (Ch. 134, Sec. 120), provide:

Sec. 3115(g). The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, (association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition, or parts of ammunition, or any necessary supplies or equipment for the Army, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War shall be capable of being

readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War, or who shall refuse to furnish such arms, ammunitions, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War, then, and in either such case, the President, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement herein provided for, is hereby authorized to take immediate possession of any such plant, or plants, and through the Ordinance Department of the United States Army, to manufacture therein in time of war, or when war shall be imminent, such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding \$50,000.

The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just. (39 Stat.)

The pertinent portions of the Act of March 4, 1917, (Ch. 180, 39 Stat. 1168, 1193), provide:

(b) That in time of war, or national emergency * * * the President is hereby authorized and empowered, in addition to all other existing provisions of law:

First. Within the limits of the amount appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing, or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of any such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient. * * *

Third. To require the owner or occupier of any factory in which ships or war material are built or produced to place at the disposal of the United States the whole or any part of the output of such factory, and, within the limits of the

amounts appropriated therefor, to deliver such output or parts thereof in such quantities and at such times as may be specified in the order at such reasonable price as shall be determined by the President.

Fourth. To requisition and take over for use or operation by the Government any factory, or any part thereof without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory.

That all authority granted to the President in this paragraph, to be exercised in time of national emergency, shall cease on March first, nineteen hundred and eighteen.

(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material, in accordance with the provisions of paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The pertinent portions of the Act of June 15, 1917, (Ch. 29, 40 Stat. 182, 183), provide that:

The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities, or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may

take immediate possession of any ship, charter, material, or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time * * *.

The pertinent portions of the Judicial Code are as follows:

Sec. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters.

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regula-

tion of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *.

Sec. 177. No interest shall be allowed on any claim up to the rendition of the judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except that interest may be allowed in any judgment of any court rendered after the passage of the Revenue Act of 1921 against the United States for any internal revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority, or any sum which was excessive or in any manner wrongfully collected under the internal revenue laws. (Sec. 177 Jud. Code, 36 Stat. L., 1141, as amended by Act of Nov. 23, 1921, 42 Stat. L., 316.)



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DECLARATION OF EXPORTER

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I, THE UNITED STATES OF AMERICA

DO hereby certify that the following is a true and correct statement of the contents of the container described below:

CONTAINER NO. 100-1000000000

CONTENTS OF CONTAINER: 100-1000000000
100-1000000000
100-1000000000
100-1000000000

DATE OF EXPORT: 100-1000000000

BY: 100-1000000000

100-1000000000

100-1000000000

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 362

LIGGETT & MYERS TOBACCO COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

No. 531

CHARLES H. PHELPS, AS SURVIVING PARTNER OF
Howard Phelps and Charles H. Phelps, Copart-
ners, Trading Under the Firm Name and Style
of Phelps Bros. & Co., petitioner

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MOTION TO ADVANCE

The United States moves that the above causes be advanced for hearing at this term.

In No. 362 the writ of certiorari to review a judgment of the Court of Claims was granted October 11, 1926, without opposition from the

(1)

United States. The question involved is whether the United States should pay for tobacco products obtained by it from the petitioner, merely their value at the date they were delivered to the United States, or "just compensation" for them, which would include the equivalent of interest on their value, to the date of payment, and this, in turn, depends on whether the products were obtained by the United States through the exercise of the power of eminent domain, or under a contract to pay the reasonable value at the date of delivery.

The products were delivered by the petitioner as the result of an order compliance with which was stated in it to be "obligatory." The petitioner accepted the order in the sense of consenting to deliver the tobacco, but refused the price stated in the offer. The Court of Claims held there was not a taking, but a contract to pay the reasonable value, and as there was no express promise to pay interest, the petitioner was limited to recovery of the value at date of delivery without interest thereon, or its equivalent, to the date of payment.

In No. 531, the writ of certiorari to review a judgment of the Court of Claims was granted October 25, 1926, without opposition from the United States. In this case a leasehold estate was taken by the United States under the power of eminent domain, and under authority of a statute which did not confer jurisdiction on the Court of Claims, the jurisdiction of that court being based on Section

145 of the Judicial Code, giving it jurisdiction of claims on contracts, express or implied. The court held that the implied contract in this case was not to pay "just compensation," but the value at the time of the taking, and since there was no express agreement to pay interest none could be allowed. One question is whether the equivalent of interest on the value to the date of payment, held in *Seaboard Air Line Railway Company v. United States*, 261 U. S. 299, to be necessary to just compensation, is in any true sense interest within the meaning of Section 177 of the Judicial Code, forbidding allowance of interest on contracts unless expressly provided for.

These two cases are typical of a class a considerable number of which are pending in the Court of Claims and District Courts, and some of which are pending in this Court or are on their way here.

The cases, while dealing with aspects of the same problem, are not alike, and decision in both is necessary to cover the field. Opposing counsel in the two cases are not the same, and the cases can not be set down for hearing as one case, although it would shorten the labors of the Court and counsel if they could be heard on the same day.

We have not overlooked the statement heretofore made by the Court that several cases involving the same question would not be advanced for hearing together, owing to the resulting confusion in division of time. On the contrary, we have re-

garded that admonition by selecting two cases typical of two related groups, and have refrained from moving to advance others like them.

It will expedite the disposition of many like cases pending below, and if the decisions should be adverse to the United States, will save the United States large sums in interest, if these cases are disposed of at this term.

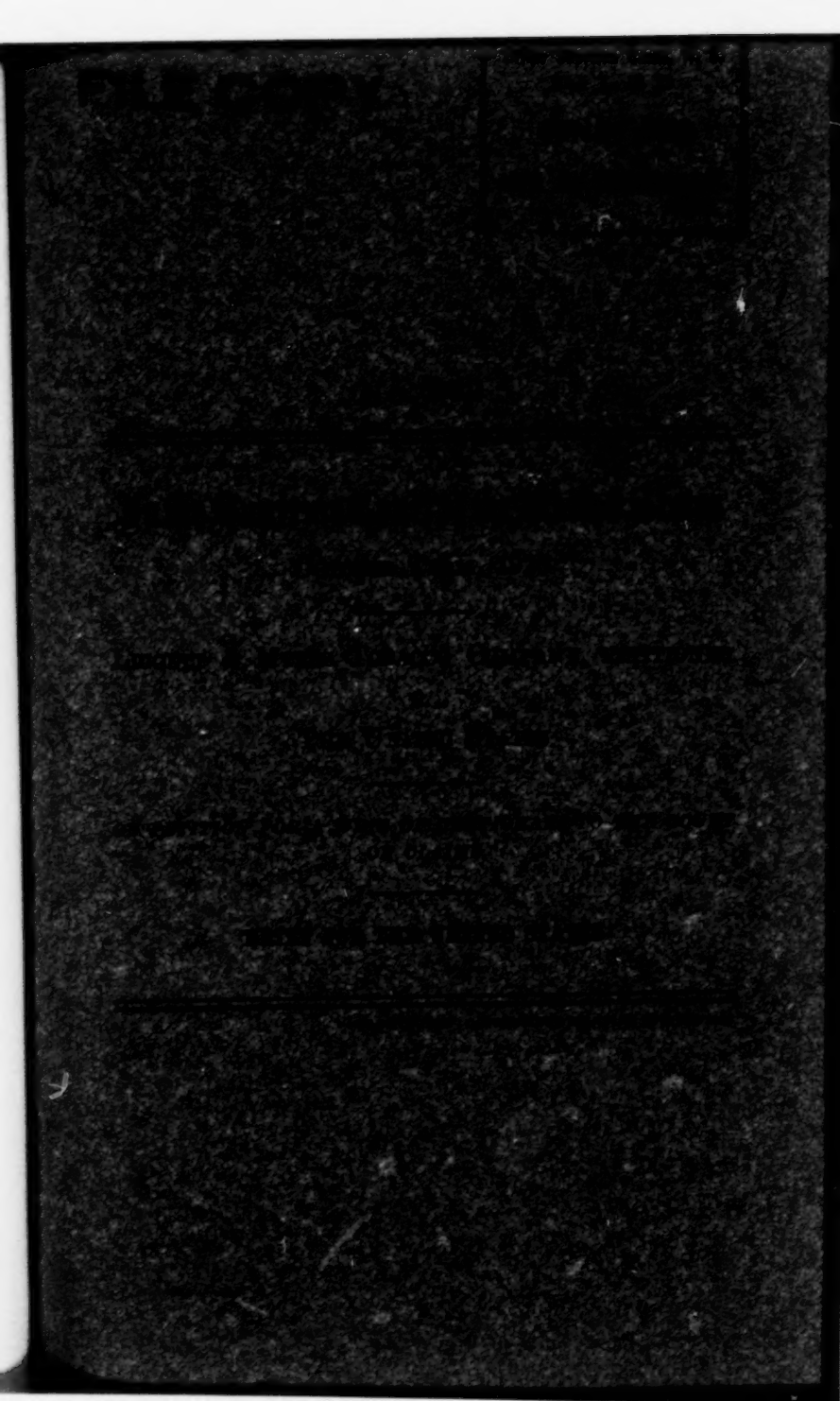
Notice has been given opposing counsel.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

DECEMBER, 1926.





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~~In the Supreme Court of the United States~~ States

~~October Term, 1924~~

~~No. 362~~

LACGETT & MYERS TOBACCO COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS

~~BRIEF FOR THE UNITED STATES~~

~~OPINION BELOW~~

The opinion of the Court of Claims has not yet
been officially reported, but will be found at page
~~45 of the record~~

~~The petition for writ of certiorari was filed May 3, 1926 (11-11-26) and was entered on the docket of the Court of Claims January 2, 1926 (11-1-26). The writ of certiorari was granted May 3, 1926 (11-11-26) under the provisions of the Act of February 13, 1925, Chap. 229, 43 Stat. 926.~~

THE QUESTION

The question presented is whether the United States should pay, for tobacco products obtained by the United States from the petitioner, the value of the tobacco products at the date they were delivered to the United States, or that value plus interest thereon from the date of delivery to the date of payment, and this, in turn, depends upon whether the tobacco products were obtained by the United States through the exercise of the power of eminent domain or under a contract with the petitioner to pay the reasonable value at the date of delivery.

STATEMENT

On August 26, 1918, Navy Order No. N-4128 was sent by the Navy Department to the petitioner. (R. 29-32.) The order provided (R. 29, 30):

1. Pursuant to the provisions of the Acts of Congress, Naval Appropriation Act approved March 4, 1917, and the Urgent Deficiency Act approved June 15, 1917 (quoted in part on reverse hereof), and acting under the direction of the President of the United States, an order is hereby placed with you under the conditions stated in subparagraph (b) (subparagraph (a) is eliminated), to furnish and deliver material needed by the Navy as listed below. Compliance with this order is obligatory, and no commercial orders shall be allowed by you to interfere with the delivery herein provided for.

(a) The price herein stated has been determined as reasonable and as just compensation for the material to be delivered; payment will be made accordingly. If the amount is not satisfactory, you will be paid 75 per centum of such amount, and further recourse may be had in the manner prescribed in the above-cited acts. Please indicate conditions under which you accept this order by filling in and signing certificate below, returning original copy of order. If you state the price fixed as reasonable is not satisfactory, 75 per cent only of the unit price will be paid. If payment in full is accepted it will be considered as constituting a formal release of all claims arising under this order.

(b) As it is impracticable to now determine a reasonable and just compensation for the material to be delivered, the fixing of the price will be subject to later determination. You are assured of a reasonable profit under this order; and as an advance payment you will be paid the unit prices stated hereon, with the understanding that such advance payment will not be considered as having any bearing upon the price to be subsequently fixed. Any difference between the amount of such advance payment and the amount finally determined upon as being just and reasonable will be paid to you or refunded by you, as the case may be. The unit price stated herein will not prejudice any future price determination or be considered as a

precedent in determining such increases or decreases as may be later decided upon as proper.

(c) The order must be accepted and filled in any event, and if placed in accordance with subparagraph (a), you are only required to indicate below whether the price stated and fixed is satisfactory or is not satisfactory. If not satisfactory, a separate letter of comment and qualification must accompany the original order that is to be signed by you and returned. If order is placed under subparagraph (b), original is to be signed and returned. The duplicate copy may be retained by you in either case.

Thereafter followed paragraphs with respect to deliveries and bills and a statement of the number and kind of tobacco products required, together with a list of the provisional prices for the tobacco products mentioned in the said order. (R. 31, 32.)

On the reverse side of the printed form appeared extracts from the Acts of March 4, 1917 (c. 180, 39 Stat., 1168, 1193), and June 15, 1917 (c. 29, 40 Stat. 182). (R. 33.)

There was also on the reverse side of said printed form certain "conditions" having to do with specifications, inspection, payments, deliveries, patent rights, etc. (R. 34, 35, 36.)

The pertinent provisions of the Acts of March 4, 1917, and June 15, 1917, referred to in this order, are printed in the appendix to this brief. These statutes authorized the President in time of war

to issue orders for war materials compliance with which would be "obligatory," and authorized the President to requisition and take over the output of any factory, and authorized the President to take possession of and seize such material if the obligatory order was not complied with, and provided further that the material should be taken at such reasonable price as should be determined by the President, but if the person from whom the material was obtained was not satisfied with that price part of it should be paid on delivery, and the person furnishing the material should be permitted to bring suit for such additional amount "as will be just compensation therefor" in the Court of Claims.

On August 31, 1918, the petitioner by written endorsement on said order stated that the same "is accepted, subject to the conditions in subparagraph (b) above," thus indicating that it would comply with the order, but rejected the price named. There were three modifications of this order, on September 9, 1918 (R. 37), on October 14, 1918 (R. 37), and on November 22, 1918 (R. 37, 38), which were accepted by the petitioner. Pursuant to the arrangement thus disclosed, the petitioner delivered between September 9, 1918, and November 23, 1918, to the Navy Department, and between September 30, 1918, and November 22, 1918, to the Marine Corps,

large quantities of different brands of tobacco, which, at the provisional prices stated in said order and modifications, amounted to the sum of \$423,-893.96. At the time of the deliveries of the tobacco, the petitioner invoiced the same in the aggregate sum of \$483,504.30, which the Court of Claims found (R. 38) was the fair and reasonable value. The Government paid on account as the tobacco was delivered the amounts of the provisional prices, and thereafter, in 1924, the petitioner brought suit in the Court of Claims to recover the difference between the amount paid and the fair and reasonable value of the tobacco at the time of delivery, which difference amounted to \$59,610.34, "together with just compensation or damages for the detention thereof." (R. 8.) The suit was based on the theory that the tobacco had been delivered in obedience to the exercise of the power of eminent domain and that "this petitioner is entitled to just compensation which is the monetary equivalent of its property as of the time of the taking or requisition thereof." (R. 7.)

The Court of Claims entered judgment for the petitioner in the sum of \$59,610.34, which was found to be the difference between the reasonable value of the tobacco at the time it was delivered and the amount heretofore paid, but refused to allow the petitioner any interest from the date of delivery of the tobacco to the date of the judgment.

ARGUMENT

The only question in this case is whether the tobacco was taken by the United States through the exercise of the power of eminent domain entitling the tobacco company to just compensation under the Fifth Amendment, as defined in the case of *Seaboard Air Line Railway Co. v. United States*, 261 U. S. 299, or whether the tobacco was delivered under an express contract to pay the reasonable value thereof at the time of delivery, and which did not expressly provide for interest to date of payment, which would prevent the petitioner, under Section 177 of the Judicial Code (which provides that no interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest), from recovering interest for the period from the date of the delivery of the tobacco to the date of payment therefor.

The Court of Claims, in a well-considered opinion, indicates its view that if this tobacco was obtained through the exercise of the power of eminent domain the petitioner would be entitled to the unpaid portion of the value at the date of the delivery of the tobacco plus interest thereon to the date of payment, for the reason that the statutes referred to in the order for tobacco authorized one whose property was requisitioned or taken under the power of eminent domain to sue in the Court of

Claims for "just compensation," in which case, under the rule laid down in the *Seaboard Air Line Railway Company case*, Section 177 of the Judicial Code, forbidding the Court of Claims to award interest, would not apply.

The Court of Claims concluded, however, that there was no requisition or taking of the tobacco under the power of eminent domain; that the tobacco was voluntarily delivered under an express contract which did not expressly provide for the payment of interest; that the jurisdiction of the Court of Claims was founded on Section 145 of the Judicial Code, allowing it to entertain suits on express or implied contracts, and not on the provisions of the Acts of March 4, 1917, and June 5, 1917, above referred to, authorizing it to entertain suits for just compensation, and that it was prohibited from allowing interest by virtue of Section 177 of the Judicial Code.

The question presented, therefore, is whether under the circumstances of this case there was a taking or requisition under the power of eminent domain, or a voluntary sale under contract. It must be conceded that the question is not settled by the decision in the case of *American Smelting and Refining Company v. United States*, 259 U. S. 75. In that case the order for merchandise did not state that compliance with it was obligatory, and made no reference to statutes authorizing the United States to requisition property, as did the naval

order in the present case. The order in the *American Smelting Company case* also specified a price of 23½ cents a pound for copper, and the Smelting Company not only agreed to deliver the copper as specified in the order, but agreed to the price fixed in the order. The Court said (p. 78):

The only serious argument is the supposed duress. But that can not prevail. It may be true that the claimant was yielding to the statute in a general way and did not discriminate between what it was required to yield and what it could reserve. But if it had desired to stand upon its legal rights it should have saved the question of the price. It did not do so, but on the contrary so far as appears was willing to contract and was content in the main with what was offered.

The view that in the present case there was no requisition or taking under the power of eminent domain rests on the contention that where an "obligatory" order or requisition is issued under a statute authorizing the exercise of the power of eminent domain, the property owner to whom it is directed may not voluntarily deliver the property in obedience to the order, but must require the United States to come and take it, and that if he does indicate an "acceptance" or willingness to comply with the order, except as to the price suggested, and thereafter voluntarily delivers the merchandise to the United States, he has made a contract which limits him to the value as of the date of

delivery without interest thereon to the date of payment, whereas if he had stood fast and refused to comply with the order in any particular, and required the Government to send and seize his property, he would place himself in the better position of being entitled, in addition to the value as of the date of the taking, to interest thereon to the date of payment.

We have attempted in this memorandum not to argue the question, but to state it. The conclusion reached by the Court of Claims is not so obviously correct as to remove the question from the field of reasonable debate.

The question is one of importance affecting constitutional rights of citizens. Other cases involving the same problem are pending in the Court of Claims and in District Courts of the United States, and the case seems to be one which is worthy the consideration of this Court, and, under all the circumstances, the United States does not feel justified in opposing the issuance of the writ.

Respectfully submitted.

/ WILLIAM D. MITCHELL,
Solicitor General.

JUNE, 1926.

APPENDIX

The pertinent portions of the Act of March 4, 1917 (Ch. 180, 39 Stat. 1168, 1193), provide:

(b) That in time of war, or national emergency * * * the President is hereby authorized and empowered, in addition to all other existing provisions of law:

First. Within the limits of the amount appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing, or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war material so ordered at such reasonable price as shall be determined by

factory or part thereof, or any ships or war material, in accordance with the provisions of paragraph (b), it shall make just compensation therefor, to be determined by the President; and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States for recovery such further sum as added to said fifty per centum shall make up such amount as will in just compensation thereof; in the manner provided for by section twenty-four, paragraph (c), and section one hundred and thirty-two of the National Code;

The previous provisions of the Act of June 11, 1917 (40 Stat. 238, 239, 240, 241), provide that:

The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

* * * * *

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of

the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the holder or proprietor of such plant.

(e) Any person who is engaged in any activity in doing such work of repair, and who under such conditions shall be found to be engaged in such activity shall be liable for the same. If any person, company, firm, corporation, or material, or machine, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities, or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material, or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, as determined by the President, is unsatisfactory to the person entitled thereto, such person shall be paid the amount so determined by the President, and shall be entitled to recover such amount as may be determined by the President, in the manner provided for by paragraph twenty, and section one and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time.

* * *

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CLERK

No. 362

In the Supreme Court of the United States

OCTOBER TERM, 1920

LIGGETT & MYERS TOBACCO COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF HABEAS CORPUS TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

U. S. GOVERNMENT PRINTING OFFICE

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 362

LIGGETT & MYERS TOBACCO COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION

The opinion of the Court of Claims (R. 41-46) is reported at 61 C. Cls. 693.

JURISDICTION

The judgment of the Court of Claims was entered on February 15, 1926. (R. 46.) The petition for writ of certiorari was filed May 3, 1926 (R. 47), and was granted October 11, 1926 (R. 48). The jurisdiction of this Court rests on the provisions of the Act of February 13, 1925. (Chap. 229, 43 Stat. 936.)

THE QUESTION

The question presented is whether the United States should pay, for tobacco products obtained by the United States from the petitioner, the value of the tobacco products at the date they were delivered to the United States, or that value plus interest thereon from the date of delivery to the date of payment, and this, in turn, depends upon whether the tobacco products were obtained by the United States through the exercise of the power of eminent domain (or possibly under a contract to pay just compensation in the constitutional sense) or under a contract with the petitioner to pay the reasonable value at the date of delivery, allowance of interest on which is forbidden by Section 177, Judicial Code.

STATEMENT

On August 26, 1918, Navy Order No. N-4128 was issued out of the Bureau of Supplies and Accounts of the Navy Department, addressed to petitioner. (R. 29.) Said order provided as follows (R. 29-30):

1. Pursuant to the provisions of the Acts of Congress, Naval Appropriation Act approved March 4, 1917, and the Urgent Deficiency Act approved June 15, 1917 (quoted in part on reverse hereof), and acting under the direction of the President of the United States, an order is hereby placed with you under the conditions stated in subparagraph (b) (subparagraph (a) is elimi-

nated), to furnish and deliver material needed by the Navy as listed below. Compliance with this order is obligatory, and no commercial orders shall be allowed by you to interfere with the delivery herein provided for.

(a) The price herein stated has been determined as reasonable and as just compensation for the material to be delivered; payment will be made accordingly. If the amount is not satisfactory, you will be paid 75 per centum of such amount, and further recourse may be had in the manner prescribed in the above-cited acts. Please indicate conditions under which you accept this order by filling in and signing certificate below, returning original copy of order. If you state the price fixed as reasonable is not satisfactory, 75 per cent only of the unit price will be paid. If payment in full is accepted it will be considered as constituting a formal release of all claims arising under this order.

(b) As it is impracticable to now determine a reasonable and just compensation for the material to be delivered, the fixing of the price will be subject to later determination. You are assured of a reasonable profit under this order; and as an advance payment you will be paid the unit prices stated hereon, with the understanding that such advance payment will not be considered as having any bearing upon the price to be subsequently fixed. Any difference between the amount of such advance payment and the amount

finally determined upon as being just and reasonable will be paid to you or refunded by you, as the case may be. The unit price stated herein will not prejudice any future price determination or be considered as a precedent in determining such increases or decreases as may be later decided upon as proper.

(c) The order must be accepted and filled in any event, and if placed in accordance with subparagraph (a), you are only required to indicate below whether the price stated and fixed is satisfactory or is not satisfactory. If not satisfactory, a separate letter of comment and qualification must accompany the original order that is to be signed by you and returned. If order is placed under subparagraph (b), original is to be signed and returned. The duplicate copy may be retained by you in either case.

Thereafter followed certain paragraphs with reference to deliveries and bills and a statement of the number and kind of products required, together with a list of the provisional prices for the tobacco products mentioned in said order. (R. 31, 32.) There was also contained among these provisions the following (R. 31):

5. The conditions appearing on the reverse side hereon are made a part of this order.

After an enumeration of certain quantities of certain brands of tobacco products, this provision occurred (R. 31):

These quantities are the estimated Navy requirements for period to 1 December, 1918. The Navy does not guarantee *to purchase* the above-stated quantities and reserves the right to increase or decrease these quantities in conformity with the requirements of the Navy during the above-stated period. Shipment will be made only on receipt of an order from the Officer-in-Charge, Provisions & Clothing Depot, based on this Navy Order. (Italics ours.)

At the end of the order the following endorsement appeared (R. 32):

The above order is accepted subject to the conditions in subparagraph b above.

LIGGETT & MYERS TOBACCO Co.,
By C. W. Toms,
Vice President.

On the reverse side of this printed order appeared extracts from said Acts of March 4, 1917, and June 15, 1917, following which was printed certain conditions. (R. 33-34.) Among other things it was provided that the articles furnished or services performed under the order must conform in all respects to the requirements of the specifications as indicated thereon, the conditions and deliveries as contained in the order, and that unless the specifications prescribed to the contrary—

all workmanship and materials entering into the manufacture or construction of the material delivered must be of the very best quality and manufacture. (R. 34.)

It was also provided that the material and service should be subject to inspection by the Government, and—

will not be accepted unless conforming in all respects to the requirements of the specifications (R. 35)—

and if the specifications directed inspection before shipment, the shipment must not be made until the material had been inspected and orders given for shipment by the inspecting officer. (R. 35.) Then followed certain conditions with reference to payments, patent rights, consignments, shipping memoranda, deliveries, responsibility prior to acceptance, deliveries in yard hours, and rejected articles (R. 35, 36), and petitioner was specifically advised that these instructions must be carefully followed and that if they were not understood they should be referred to the Bureau of Supplies and Accounts for instructions (R. 36).

The pertinent provisions of the Act of March 4, 1917 (Chap. 180, 39 Stat. 1168, 1193), and of the Act of June 15, 1917 (Chap. 29, 40 Stat. 182, 183), are printed in an appendix to this brief. There were three modifications of the order, two increasing the amounts, and each was signed by the Paymaster General of the Navy. One dated September 9, 1918, was to the effect that any orders issued by the Quartermaster of the Marine Corps at Washington for the brands of tobacco specified in the original order were to be executed and billed at the prices

stated thereon. (R. 37.) Another modification was made on October 14, 1918, for certain additional products (R. 37), and another modification on November 22, 1918, for additional quantities of tobacco products to be shipped when ordered by the officer in charge of the Fleet Supply Base at South Brooklyn (R. 37, 38). Each of these modifications was accepted by petitioner by an endorsement thereon. (R. 37, 38.) The petitioner delivered large quantities of tobacco products under these orders between September 9, 1918, and November 23, 1918, for which it billed the Government in the aggregate sum of \$483,504.30, which the Court of Claims finds as a fact was the fair and reasonable value of said products. The Government paid upon the basis of the provisional price the sum of \$423,893.96, making a difference between the fair value and the price paid of the sum of \$59,610.34 (R. 38), for which sum the Court of Claims rendered judgment (R. 47).

By a letter received by petitioner February 20, 1919, the Navy Department cancelled the original order as modified and no further orders or deliveries were made after that. (R. 38, 39.)

By a letter dated December 4, 1920, the Bureau of Supplies and Accounts attempted to modify this order by applying the terms and conditions of subparagraph (a) thereof and then fixed a final price as stated in said letter for each of the products so previously delivered by petitioner. It was also stated that these prices were fixed upon the basis of

the Federal Trade Commission's report, and with the concurrence of the Army, the Marine Corps, and the Navy, and that upon the basis of the prices so fixed the petitioner had been overpaid by the provisional prices in the sum of \$4,968.44, which the letter requested be returned to the Government. (R. 39, 40.) The letter further stated that if petitioner decided that these prices as just compensation were not satisfactory, that claim should be made for the additional amount desired. (R. 40.) The petitioner on December 7, 1920, advised the Paymaster General of the Navy that the settlement proposed was unsatisfactory and could not be accepted. (R. 40.)

Upon these facts the Court of Claims concluded that the transaction here involved was a contract and not a taking of the property of petitioner by the Government under the power of eminent domain. It also held that the petitioner had not been paid the reasonable value of the products taken, to which sum it was entitled under the contract, and therefore the court rendered judgment for the difference between such reasonable value and the amount already paid. The court declined to allow any sum for interest or the equivalent thereof, holding that, as the transaction was a contract, Section 177 of the Judicial Code, which prohibited the allowance of interest upon any claim in the Court of Claims prior to judgment thereon in the absence of a contract or a statute expressly

stipulating for its payment, prevented the recovery of any interest or its equivalent in this case.

SUMMARY OF ARGUMENT

The transaction was a contract and not a requisition of property. The order itself shows that it was intended as a contract. There is no power in the Government to requisition property not in existence. The Paymaster General of the Navy had no authority to requisition property. The transaction was a contract which agreed to pay the fair value of the property delivered and to such sum no interest can be allowed.

ARGUMENT

Preliminary Statement

The petitioner contends that the transaction here involved was the commandeering or requisition of its property under the Acts of March 4, 1917, and June 15, 1917. It therefore urges that it is entitled to just compensation in accordance with the principles laid down by this Court in the case of *Seaboard Air Line Railway Co. v. United States*, 261 U. S. 299, and *Brooks-Scanlon Corporation v. United States*, 265 U. S. 106.

The Court of Claims has already allowed a recovery of the difference between the market value of the tobacco products at the time delivered and the amount which has previously been paid by the Government. The propriety of this action is not

questioned, but the petitioner contends that the court should also have allowed as part of just compensation a sum equal to interest upon this amount, for which the Court of Claims rendered judgment, from the date of the delivery of the tobacco products down to the date of payment. The Government contends that the Court of Claims properly held that the transaction here involved was not a commandeering or requisition of property but was a contract; that the contract was not one expressly stipulating for the payment of interest, and that in the absence of such express stipulation the provisions of Section 177 of the Judicial Code prohibit the allowance of interest upon such claim either directly or indirectly.

THE TRANSACTION WAS NOT A REQUISITION, BUT A
CONTRACT

The terms of the order as well as the actions of the parties thereunder show that the transaction was a contract

The order was issued by the Paymaster General of the Navy and states that pursuant to said Acts of March 4, 1917, and June 15, 1917, and acting under the direction of the President—

an order is hereby placed with you under the conditions stated in subparagraph (b)
* * * to furnish and deliver material needed by the Navy as listed below. Compliance with this order is obligatory, and no commercial orders shall be allowed by you to interfere with the delivery herein provided for. (R. 29, 30.)

While the form of order used is not conclusive, to say the least it must be persuasive. The words used are not those of command or requirement. Where it states that an order is placed it is but using the words of an ordinary commercial transaction. Where it states that the order is placed "to furnish and deliver" again we have the words of the ordinary commercial transaction of purchase and sale. Had the transaction been a commandeering, it would have been the immediate taking possession of property then on hand, and need to have consisted of no more than a mere notice that the Government then and there took the property; not that it placed an order with the company to furnish and deliver materials.

Petitioner seeks some solace in the words to the effect that the compliance with the order is obligatory and no commercial order shall be allowed to interfere with the delivery therein provided for. These words are but a repetition of the words of the statute, and an analysis of the statute will make their meaning clear.

In considering the statute it should be borne in mind that commandeering or requisitioning of property is essentially a proceeding *in rem*. *Duckett & Co. v. United States*, 266 U. S. 149, 151. This is quite well stated in an opinion rendered by Mr. Justice Sanford, then District Judge, "*In re Condemnation Suits by the United States*" (234 Fed. 443), where at p. 445 it is said:

Such condemnation proceedings are generally recognized as being essentially proceedings in rem.

To the same effect is the decision by the Court of Appeals of the District of Columbia in *District of Columbia v. Jones*, 38 App. D. C. 560, 564. Many State decisions are to the same effect. The reason for this conclusion is very apparent. When the Government or one acting under its authority exercises the power of eminent domain, it immediately takes the property which is then in existence, and the property must be in existence in order that its taking may have something upon which to operate. The title then passes to the Government. The exercise of the power operates upon the thing taken and not upon the owner.

While it is not necessary to go to such extent, it may well be doubted whether the Government had any authority or power either through its legislative, executive, or judicial branches to compel any person or corporation to operate its plant and produce articles which it desired. What would be the machinery to enforce the execution of such order? How could its specific performance be compelled?

In enacting the statutes here involved, it is very apparent that Congress must have had these things in mind, because these statutes, especially the Act of June 15, 1917, which is the broadest, contemplated three things:

1. That the Government might requisition or commandeer property then in existence.

2. That the Government might place an order for the production or manufacture of products not then in existence, but which it would need; and that compliance with the same would be obligatory so far as commercial orders were concerned and should take preference over such orders. In this way those with whom the Government placed these orders would be relieved of actions for damages by commercial contractors. The use of the word "obligatory" in the same sentence with the reference to other commercial orders clearly indicates this purpose and intent.

3. If the manufacturer did not accept the Government's order, then the Government could exercise its power of eminent domain and take the plant or property or the use thereof and operate the same for the purpose of producing the articles which it needed and which the manufacturer declined to produce. Such taking of a plant or factory would have been an exercise of the power of eminent domain and would have operated upon property then in existence.

The foregoing analysis of this statute complies with all rules of statutory construction. It considers the needs of the Government and the situation which the statute was intended to meet. It considers the condition of the law with regard to such matters then in existence, and last, but perhaps

most important, it gives a full, clear, and consistent meaning to every portion of the Act without any duplications, inconsistencies, or ambiguities. With these things clearly in mind, the intent of the order, as well as of the parties issuing the same, and, it is believed it may be said, of the parties accepting it, becomes clear and shows that the transaction was not a requisition but was a contract. Full meaning is given to the word "obligatory" used in both the statute and the order in the same sense and with the same meaning.

The other provisions of the order confirm the conclusion that it was a contract. After an enumeration of the products desired it is stated that (R. 31)—

The Navy does not guarantee *to purchase* the above-stated quantities and reserves the right to increase or decrease these quantities in conformity with the requirements of the Navy during the above-stated period. (Italics ours.)

Here the Government stated that it did not agree to buy all of the products enumerated but reserved the right to increase or decrease the amount thereof.

Here the express words of purchase are used. If it was a requisition of the quantity stated, the Government would have then and there become the owner thereof, with no right to decrease its interests in the property taken or its obligations because thereof, and at the same time with no rights to in-

crease the amounts without new takings or requisitions.

The order also provides that any portion of the Navy's requirements—

will be furnished Tax Paid or In Bond, as directed by the Officer in Charge. (R. 31, 32.)

Had it been a requisition the property would have been taken "as is" without any power or authority to require the petitioner to do additional things.

The order also provided for "inspection at the point of delivery." (R. 32.) How could the Government, had it requisitioned the property, thereafter inspect and reject the same? As above stated, had it requisitioned it the Government would have taken the property "as is." But the order further provided that the articles furnished or services performed under the same must conform in all respects to the requirements and specifications indicated thereon (R. 34), and that the materials delivered or services performed should be subject to inspection and examination by officers of the Navy—

and will not be accepted unless conforming in all respects to the requirements of the specifications (R. 35).

All of these provisions are clearly inconsistent with any idea of a requisition. No inspection would have been necessary, no rejection would have been

possible. The title would have already passed to the United States and the property would have been taken in its then existing condition. Further than that, when the order was received it was accepted in writing by the petitioner and the deliveries were made by the petitioner in accordance with the terms thereof. If the order had been a requisition, no acceptance was necessary. See *American Smelting and Refining Co. v. United States*, 259 U. S. 75.

When the needs of the Navy were filled, the contract was cancelled and no further orders or deliveries were made after that. (R. 38, 39.) If the transaction had been a requisition the title would already have passed. The Government would have been then the owner of the property and there would have been no right by the Government to cancel.

The Act of March 4, 1917, provided that if the owner of property requisitioned was dissatisfied with the price fixed he should receive 50 per cent of the price so fixed and sue for the balance. The Act of June 15, 1917, provided that he should receive 75 per cent of the amount so fixed, and sue for the balance. In this case the petitioner billed at neither 50 per cent or 75 per cent, but billed at a sum in excess of the price tentatively fixed. It received and kept, with no offer to return, the full amount of the price tentatively fixed by the Government. This shows that neither party considered that they were proceeding with a requisition under the Act, but, on the contrary, they be-

lieved they were proceeding strictly in accordance with the terms of the contract which they had made. Had the Government believed it was a requisition under the statute it would have had no right or power to offer more than the fixed percentages except upon acceptance in full payment by petitioner. Had petitioner believed it was such a requisition it would have had no right to demand or receive more than the fixed percentages.

From the above discussion, it is submitted that the order shows upon its face that the transaction here involved is a contract. The facts found by the Court of Claims show that the parties believed they were making a contract and acted in accordance therewith, and not with any idea of proceeding under a requisition of the property by the Government.

The order was for products not in existence

We have heretofore discussed to some extent this proposition, but it is believed it is of such importance that it should be enlarged upon as a separate point. As heretofore set out, proceedings in condemnation and proceedings to requisition and commandeer property are proceedings *in rem*. There must be a *res* upon which the same can operate. That *res* must be in existence. We are unable to conceive what branch of the Government would have authority to issue an order requiring any person or corporation to operate its plant and produce

goods. What power or force is there in the Government to compel a performance of such an order? What are the mechanics by which it could be accomplished? If such a power existed, how could it be successfully carried out? On the other hand, the whole theory of the exercise of the power of eminent domain by the Government is that the Government has need for an existing thing, whether it be a piece of real estate or personal property. The Government then and there determines to exercise its power to take that thing in existence, and when the power is exercised the article in the condition in which it then exists becomes the property of the Government. There is no power in the Government to requisition articles not in existence, and Congress would not undertake to authorize the President to exercise such power. The discussion heretofore given of this Act clearly shows that Congress had in mind the foregoing well-settled rules concerning these matters; that it intended to authorize the President to issue an order to acquire the products it needed by contract and then, if compliance was refused, to exercise its power of eminent domain upon an existing object by taking the plant and letting the Government manufacture the articles for itself. This clearly shows that the transaction here involved was not and could not have been a requisition.

*The order was not signed by the President or the
Secretary of the Navy*

The Act of March 4, 1917, provided that the President should exercise the powers therein given. The Act of June 15, 1917, gave its powers to the President, but provided that the President might exercise the power and authority thereby vested in him through such agency or agencies as he should from time to time determine. By an Executive order dated August 21, 1917 (which is set out in the Appendix hereto), the President undertook to delegate the powers conferred upon him by the Act of June 15, 1917, to the Secretary of the Navy. For the reasons hereinafter set forth he could not have delegated by this Executive order the powers conferred by the Act of March 4, 1917, because the Act gave him no such right of delegation.

Of course, it is well recognized that there are certain powers which require the personal discretion of the officer to whom they are given that can not be delegated. Judicial powers are of this character. (*Runkle v. United States*, 122 U. S. 543, 557.) The determination of just compensation under the Constitution is of a judicial character; the determination of whether property is to be taken under the power of eminent domain has been held to be of a judicial character. (*Ontario Knitting Co. v. State of New York*, 205 N. Y. 409, 415, 416; affirmed 147 App. Div. 316.) But even if the

power of determination as to what property should be subjected to requisition is not of a judicial character, it certainly is not a ministerial duty, but is a thing which requires the exercise of the utmost discretion. The power to take a man's property for public use is a very sacred and extreme proceeding, and the exercise of that power is a very delicate matter. It should only be exercised in cases of great necessity and after mature consideration by an officer of high standing and unusual judgment. Congress therefore permitted the exercise of this power only by the President or by such officer or agency as he might designate. He did designate for this purpose the Secretary of the Navy. The Secretary of the Navy did not sign the order. It was signed by the Paymaster General of the Navy. While it is no doubt true that the Paymaster General of the Navy may have been a man of exceptional ability and judgment, he was not designated by the President to exercise this authority, and the Secretary of the Navy, whom the President had designated, had no authority to delegate such power to another. If such power existed it could be delegated *ad infinitum*, until the office boy would be taking the private property of American citizens for public use under the unusual power of eminent domain.

On the other hand, it is clear that the Paymaster General did have authority to enter into contracts. He exercises such power in many instances. This

further goes to show that the transaction herein involved must have been a contract, and not a requisition. If it was not a contract it was nothing at all. It was but a mere unauthorized act of a Government officer, a tort, of which the Court of Claims has no jurisdiction, and the parties could recover in this case, if at all, only upon the theory of an implied contract by waiving the tort.

WHAT WERE THE TERMS OF THE CONTRACT?

Having shown that the transaction must be a contract, let us ascertain its terms. The contract was that the petitioner should manufacture the articles specified in the contract with such increases or decreases as the contract permitted and that the Government would pay a reasonable price therefor. In order that the petitioner might be paid something approximating the reasonable price, a tentative price was fixed, at which rate it was agreed the Government would make payments on account, the whole matter to be subject to readjustment when the final reasonable price was determined. The cause of action accrued when the property was delivered. The money was due then. The obligation and agreement of the Government was to pay the then reasonable price or market value of the goods. The court has determined what that price was and has allowed a recovery of a sum sufficient to equal that price. The petitioner was entitled to no more. There was no agreement to pay interest; the contract did not expressly stipulate for its payment,

and in the absence thereof Section 177 of the Judicial Code forbids any such payment. That section is as follows:

No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.

But let us assume (which we do not concede) that the contract was to pay just compensation. Even so, the result would be the same. The just compensation is to be determined as of the time the property was delivered. The cause of action then accrued and any claim which the petitioner had on account thereof arose at that time. Section 177 prohibiting interest is equally applicable.

Assuming that the just compensation provided for by the contract was the same as the just compensation of the statute, it still did not allow the payment of interest. In all the cases in which a contract has been implied upon the taking of property by the Government for public use because of the constitutional provision concerning just compensation the obligation to pay just compensation is of the same character, the same extent, and the same force as that which would exist if this contract is to be construed as one to pay just compensation. The contention has been made in those cases that interest should be allowed, and the contention has also been made that while interest as such may not be allowed in these implied contracts

that still a sum measured by interest should be allowed as part of the just compensation provided for in the contract. This contention was squarely met by the Court in the case of *United States v. North American Transportation & Trading Company*, 253 U. S. 330, 335, and it was there held that in view of the prohibitions imposed by Section 177 of the Judicial Code, which was but an incorporation into the statute of the existing principles of common law against the allowance of interest in any form against a sovereign government for delay in payment in the absence of a contract expressly stipulating for its payment, such interest could not be allowed.

Certainly this contract did not expressly stipulate for the payment of interest, and the most that can be said of it (and we do not consider that it is correct) is that there was an implied promise to pay interest. It is impossible for such an implication to arise in view of the statute. Even if it arose such an implied promise would have no effect, as the statute prohibits the payment of any interest in the absence of an express (not implied) stipulation for its payment.

THE CONTENTION THAT THE CASE ARISES UNDER THE CONSTITUTION OR THE LAWS OF CONGRESS

This contention is advanced by inference if not directly in the brief filed in this case by *amici curia*. This contention is not new. The conten-

tion that in situations where private property was taken for public use a cause of action arose under the Constitution or laws of Congress was first advanced in the case of *Schillinger v. United States*, 155 U. S. 163. It was there overruled, although a dissenting opinion by Justices Harlan and Shiras indicated their concurrence with such contention. The question next appeared in the case of *United States v. Lynah*, 188 U. S. 445. The majority opinion of the Court rejected the contention. The concurring opinion by Justices Brown, Shiras, and Peckham concurred in the contention; but in the much later case of *Basso v. United States*, 239 U. S. 602, the contention was finally disposed of, and the rule announced in the *Schillinger* case was followed. This Court again, in the case of *United States v. Holland-American Line*, 254 U. S. 148, refused to overrule the *Schillinger* case, but followed the same. See also *United States v. North American Transportation & Trading Co.*, 253 U. S. 330, 335.)

Again let us assume (without conceding) that it is a case which arose under the Constitution or under the laws of Congress. We still maintain that the Constitution and the applicable law of Congress can be construed to be no more than a promise to pay just compensation, and that under the decisions of this Court in the *North American Transportation & Trading Company* case that must be con-

strued to be the market value at the time of taking, without any additions of interest or additions of any sum measured by interest. The case of *Seaboard Air Line Railway Co. v. United States*, 261 U. S. 299, and *Brooks-Scanlon Corporation v. United States*, 265 U. S. 106, are not at all inconsistent with this theory. Those cases were based upon a special jurisdiction of the courts involved—in the *Seaboard case* the District Court under the Lever Act, in the *Brooks-Scanlon case* under the Act of June 15, 1917. They were clearly requisitions of property, and did not rest to any extent upon a contract. Interest was not allowed as such in those cases, but merely a part of the just compensation which was provided. This Court held that the statute contemplated a kind of condemnation proceeding operated in a sort of reversed order from that in which condemnation proceedings usually are conducted, namely, that instead of paying and then taking the property, the property was taken and the Government then paid. In view of that situation the statute when it authorized just compensation authorized that compensation as of the time that the payment was made. The *North American Trading and Transportation case* contemplated the possibility of such a situation as that and in the opinion this Court expressly stated that in such case, if it arise, such a sum equal to interest might be allowed. (See *North American, etc., case*, 253 U. S. 330 at 337.)

CONCLUSION

For the reasons heretofore set out, it is respectfully submitted that the conclusion of the Court of Claims is correct and should be affirmed.

Respectfully submitted.

✓ WILLIAM D. MITCHELL,
Solicitor General.

✓ HERMAN J. GALLOWAY,
Assistant Attorney General.

FEBRUARY, 1927.

NOTE

The situation in this case makes it desirable to present to the Court every argument which may be adduced in support of the opinion of the Court of Claims, and I have subscribed the above brief for that purpose. It does not state my views of the law. This case, in my judgment, discloses a requisition of property under the power of eminent domain.

The Acts of March 4, 1917, and June 15, 1917, authorized the President to requisition property under the power of eminent domain. The Navy Department order cited and referred to those statutes and stated that the action of the President was pursuant to them, that the order was obligatory, and that it must be filled. If the Tobacco Company had not "accepted" the order in the sense of indicating its willingness to yield to it, its plant would have been seized and the tobacco taken by force. There was a declaration by the United States that it was taking the property under the power of eminent domain and that it would take it whether the Tobacco Company was willing or not, and the act of the company in yielding to this superior force, to the extent of handing over its property in obedience to the order, standing at the same time on its right to just compensation, did not

change the nature of the transaction. By "accepting" the order and refusing the price later offered, and standing on its right to just compensation, the company did nothing more than notify the Government that it need not send agents to take the tobacco by force.

This case is distinguishable from *American Smelting and Refining Co. v. United States*, 259 U. S. 75, because here the property owner did "save the question of price."

It should not be necessary for a citizen, in order to save his right to just compensation under the Constitution, to require the Government to proceed to take his property by physical force. The result of the decision below is that it is to the interest of the citizen not to yield to such an obligatory order to the extent of delivering property under it, but to require the Government to take his property by physical force. It is not in the interest of the United States to establish such a rule. In time of war its interests are served by obtaining requisitioned property with the least trouble.

The clauses in the order, which read as if a contract was contemplated, may be accounted for by the fact that it was contemplated the transaction might become a contract if an offered price was accepted as satisfactory.

With respect to the matter of authority to requisition, dealt with in the opinion of the Court of

Claims (R. 45), the obligatory order recited that it was issued pursuant to the statutes referred to "under the direction of the President of the United States" (R. 29), and that the Paymaster General had signed it "by direction of the Secretary of the Navy." (R. 12.) In the absence of anything to the contrary, this discloses sufficient authority from the President and the Secretary.

With respect to the point that the goods taken were not in existence when the order was issued, but were later manufactured, the transaction may be considered as a requisition of the output or as a continuing requisition of the manufactured product as and when produced. *Omnia Commercial Co., Inc., v. United States*, 261 U. S. 502.

Even if the transaction be considered a contract, it may be taken as a contract to pay just compensation in the constitutional sense. If the express promise was to pay just compensation, in the sense of the Fifth Amendment, as defined in *Seaboard Air Line Ry. Co. v. United States*, *supra*, it was an express contract to pay the full equivalent of the value at the time of taking, paid contemporaneously with the taking, which is equivalent to an express promise to add to the value at the date of taking, a sum measured by interest on that value from the date of taking to the date of payment, and in that case there is not much left of Section 177 of the Judicial Code as applied to this case.

If this transaction was a requisition and not a contract, the Court of Claims had jurisdiction to render judgment for just compensation in the constitutional sense, because the applicable statute conferred jurisdiction on that court to award just compensation.

✓ WILLIAM D. MITCHELL,
Solicitor General

FEBRUARY, 1927.

APPENDIX

The pertinent portions of the Act of March 4, 1917 (Chap. 180, 39 Stat. 1168, 1193), provide:

(b) That in time of war, or of national emergency, * * * the President is hereby authorized and empowered, in addition to all other existing provisions of law:

First, Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing, or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take im-

mediate possession of any factory of such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

* * * * *

Third. To require the owner or occupier of any factory in which ships or war material are built or produced to place at the disposal of the United States the whole or any part of the output of such factory, and, within the limit of the amounts appropriated therefor, to deliver such output or parts thereof in such quantities and at such times as may be specified in the order at such reasonable price as shall be determined by the President.

Fourth. To requisition and take over for use or operation by the Government any factory, or any part thereof without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory.

That all authority granted to the President in this paragraph, to be exercised in time of national emergency, shall cease on March first, nineteen hundred and eighteen.

(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material, in accordance with the provisions

of paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The pertinent provisions of the Act of June 15, 1917 (Chap. 29, 40 Stat. 182, 183), provide that:

The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

* * * * *

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such out-

put or part thereof in such quantities and at such times as may be specified in the order.

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(e) * * * * *

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, ac-

quire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time * * *

EXECUTIVE ORDER

By virtue of authority vested in me in the section entitled " Naval Emergency Fund " of an Act of Congress entitled " An Act Making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes," approved March 4, 1917, and in the section entitled " Emergency Shipping Fund " of an Act of Congress entitled " An Act Making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15, 1917, I hereby direct that the Secretary of the Navy shall have and exercise all power and authority vested in me in said sections of said acts, in so far as applicable to and in furtherance of the construction of vessels for the use of the Navy and of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for construction of vessels for the Navy and of war materials, equipment and munitions required for the use of the Navy, and the more economical and expeditious delivery thereof.

The powers herein delegated to the Secretary of the Navy may, in his discretion, be exercised directly by him, or through any other officer or officers who, acting under his direction, have authority to make contracts on behalf of the Government.

WOODROW WILSON.

THE WHITE HOUSE,
21 August, 1917.



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IN THE
Supreme Court of the United States
WILLIAM STANSBURY
CLERK

No. 36. 2

October Term, 1926

LIGGETT & MYERS TOBACCO COMPANY,

Petitioner,

THE UNITED STATES

ON CERTIORARI TO THE COURT OF CLAIMS

Brief of Ira Jewell Williams, John E.
Stone and F. R. Forsaker, as Amici Curiae.

JOHN E. STONE,

F. R. FORSAKER,

IRA JEWELL WILLIAMS,

Amici Curiae.
Filed March 1927.

The Justice Department, Inc.
Counsel for the Government

RECORDED IN COURT OF CLAIMS

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IN THE
Supreme Court of the United States.

October Term, 1926. No. 362.

LIGGETT & MYERS TOBACCO COMPANY,
Petitioner,

v.

THE UNITED STATES.

ON CERTIORARI TO THE COURT OF CLAIMS.

**BRIEF OF IRA JEWELL WILLIAMS, JOHN H.
STONE AND F. R. FORAKER, AS AMICI
CURLÆ.**

STATEMENT OF QUESTION INVOLVED.

Where goods are manufactured and furnished under mandatory orders issued under Congressional power making such orders obligatory and giving precedence thereto over commercial orders, is there a "taking" giving rise to true just compensation, *i. e.*, market value and just compensation for delay in payment?

I. A PROMISE NOT TO DISOBEY A COMMAND OF GOVERNMENT DOES NOT CONSTITUTE A CONTRACT.

Congress authorized "obligatory" orders—to be given preference over all commercial transactions. Such obligatory orders were issued in war time. The citizen signed saying, in effect, "I will obey." All parties believed that the orders were obligatory and requisitions. The facts found showed a clear right to just compensation for the balance of the value of the goods furnished. The Government was unable to suggest any defense.

The Court below, however, *sua sponte*, found that the orders were not obligatory; that they did not constitute requisitions; that the status was not of obedience to law and command but consensual, and, hence, that although claimant saved the price and reserved its rights to just compensation, that meant merely a contract to pay just compensation as of the time of the taking and claimant could not recover just compensation for the long delay in payment.

While the obligatory orders were placed "by the direction of the President" under certain statutes of 1917 authorizing the placing of obligatory orders and the payment of just compensation for goods obtained thereby, the Navy did not proceed *sub modo*. As the records of this court

United States v. New River Collieries Company, 262 U. S. 341 (1922),

and the Court of Claims

Atlantic Refining Co. v. United States, 59 C. Cls. 108 (1923),

show, the Navy instead of attempting to ascertain the market value of goods obligatorily ordered, adopted its own formula of "cost plus a reasonable profit to the least economical producer whose product was necessary to supply the demand."

Blake v. United States, 275 Fed. 861, 867 (1921).

Such nuances were, of course, irregular because in disregard of the exhortation of the acts that the President fix just compensation and pay 75 per cent. thereof. But the obligatory orders were issued by virtue of an express authorization to issue obligatory orders, and the failure of the executive department to observe details merely directory, so far as regards the right of the citizen to object, did not deprive the obligatory order of its exigent character. It was a command in war time from the supreme power in the State and neither the citizen to whom it was directed nor the Government after its execution could disavow its mandatory character or justify disobedience thereto on the ground that it asked for an acceptance and hence was the offer of a contract, or on the ground that it offered a tentative price to be paid in full instead of fixing just compensation and paying 75 per cent. thereof. The obligatory order had the essential elements: that it was issued by virtue of an express congressional action, that it purported to be an obligatory order so issued, and that it carried upon its face the irrefutable evidence of its mandatory nature.

The Court of Claims held that the obligatory order could not be anything except an offer to contract because it contemplated an acceptance. This is sticking in the bark since an acceptance of a command merely means the signifying of an intent to obey. The goods were goods to be manufactured and the Navy naturally wished to be assured that the citizen instead of

being disloyal and intransigent would proceed with all speed laying aside all commercial business to obey the command of the commander-in-chief.

A request from a superior is a command:

State *ex rel.* Freeman v. Scheve, 93 N. W. 169, 170 (1902); 65 Neb. 853 (1902); 59 L. R. A., 927 (1902).

II. PRIVATE PROPERTY MAY BE TAKEN FOR PUBLIC USE WITHOUT ACTUAL PHYSICAL FORCE.

Is the test physical seizure or obligatory *requirement*? Goods to be manufactured cannot be physically seized any more than a contract can be physically seized:

Brooks-Scanlon Corp. v. United States, 265 U. S. 106 (1924).

All ships on the ways were requisitioned by a notice to the shipbuilder that the contract had been requisitioned.

All ships *in esse* over 2500 tons burden were requisitioned by proclamation of the President. Was not a ship at sea which got the news by radio under a real obligation to obey?

Coal to be mined has been taken under obligatory orders and a judgment, including interest, affirmed by this Court:

United States v. New River Collieries Company, 262 U. S. 341 (1922).

As to the interest element see

New River Collieries Co. v. United States, 300 Fed. 333 (1924), Bodine, *D. J.*

Petroleum products (to be manufactured) in like manner were required by obligatory order and the Court below gave judgment with interest:

Atlantic Refining Company v. United
States, 59 C. Cls. 108 (1923).

How better define "requisition" than an obligatory requirement? Did the Government "require" these goods to be furnished? What could Congress have intended when it authorized an obligatory order except to give power to the executive to *require* citizens to obey?

Congress had power to say that the citizen *must*. Congress had power to authorize the executive to say that the citizen *must*. Congress acted. The executive acted. Hence, the law of the case.

All the Acts in effect say "must": It is the law that we *must* furnish war material on the demand of the Government. Whether technically a requisition, it is a legal requirement and rule of law: The law said we must when the Secretary said we must, and the Secretary said we must and we did because we knew and believed we must and that if we did not, we would be criminals and/or bereft of our plant.

The Navy required the goods to be delivered. There was power so to require. The Navy asserted that power. An obligatory order is a command. A command in war time to comply with the requirements of the Government is a requisition. The requirements of the Navy intervened and were interposed as against the ordinary conduct of the citizen's business. The requirements of the Navy were complied with because such requirements were obligatory. What was all this but a requisition? How else requisition goods to be manufactured? Must the government turn manufacturer? And if the manufacturer makes and delivers

under compulsion, is not the governmental function which the Government is carrying on under war powers granted in war time the act of requisition?

To requisition is "To make a requisition or *authoritative demand for*, especially for military purposes."

A requisition is the "Act of requiring or *demanding as of right*; a *demand or application made by authority*."

Webster's New International Dictionary.

A requisition is the "Act of demanding a thing to be done by virtue of some right."

Bouvier's Law Dictionary, 3d Ed., Vol. 3, p. 2904.

An obligatory order (*i. e.*, a command) and a conditional offer are self-contradictory terms.

It is a contradiction in terms to say that when in time of war the commander-in-chief commands the citizen by an obligatory order to deliver materials which he has on hand or can produce, whether such command is backed by the sanction of arrest and prosecution for a felony or whether it is backed by the sanction of a taking over of the citizen's plant, obedience to the command results in a contract.

The contrary contention leads to an absurd and untenable conclusion: There can be no taking short of actual physical taking; there was no actual physical taking here; hence, there was no taking; hence, it must be a contract. The case must be pigeonholed under "Contract" or "Commandeering." It cannot go under "Commandeering" because delivery was made without actual violence. Hence, it must go under "Contract"!

III. THE NATIONAL DEFENSE ACT (3 JUNE, 1916) MADE THESE ORDERS OBLIGATORY AND NON-COMPLIANCE A FELONY SUBJECT TO FINE AND IMPRISONMENT.

Congress, anticipating war, had on June 3, 1916, empowered "the President in time of war . . . through the head of any Department of the Government" to place an order, compliance with which "shall be obligatory" the compensation to be "just," and a violation to be a felony punished by three years' imprisonment and \$50,000 fine.

That was the law and the citizen was bound to know it.

The law contemplated that the President act through "the head of any Department." The obligatory order was placed "under the direction of the President of the United States" and "by direction of the Secretary of the Navy."

The Secretary of the Navy did not specify that law. But his failure to mention the law did not wipe it from the statute books. The authority was there and the head of the department was affecting to act "under the direction of the President of the United States."

The Secretary had no power in peace time to waive the applicable provisions of any criminal statute. Such waiver could not be by silence. In war time the whole power of the law must be back of every action of department heads looking to the conduct of the war.

The program and procedure of the Navy came directly within the express terms of the National Defense Act. Sound public policy and common-sense alike dictate that the citizen may not deny, or the Government officials disclaim, the exigency and sanction of express statutes clearly applicable for the strengthen-

ing of the hands of the Government and the stimulating of cooperative conduct by citizens in war time.

There could have been no defense to the criminal provisions of the National Defense Act.

The formal Navy orders state they were "placed" pursuant to the provisions of the Acts of Congress of March 4, 1917, and June 15, 1917. These acts authorize and empower the President to "place an order" compliance with which shall be "obligatory."

IV. CONGRESS MUST HAVE INTENDED THAT TRUE JUST COMPENSATION BE PAID ON "OBLIGATORY" ORDERS.

Having yielded submission and obedience, what does the law of Congress say as to what we are to get for our property? The National Defense Act said that "compensation" shall be fair and "just." The Acts of 1917 say that we are entitled to "just compensation." What did Congress mean by just compensation? Congress used terms of art, a phrase from the Constitution—a pertinent and apposite phrase. The Congress was dealing with the compensation of citizens for material delivered to the Government in war time under Governmental coercion or compulsion. The Congress said "just compensation." Congress must have intended true just compensation, namely, just compensation as of the time when payment should have been but was not paid. So construed, the mandate is plain to pay in full, notwithstanding Section 177.

The case does not arise out of any implied contract, but is based upon the express terms of Section 145 of the Judicial Code: "All claims . . . founded upon the Constitution of the United States or any law of Congress . . ." and the Act of June 15, 1917: "to re-

cover . . . just compensation . . . in the manner provided for by . . . Section 145 of the Judicial Code."

The claim here is founded upon the Constitution of the United States and a law of Congress in pursuance thereof. Congress has written into its laws the words of the Constitution. Those words had and have a well-known and clearly understood meaning. When Congress adopted those words Congress used them with that meaning. Market price being the measure of just compensation, the citizen could have obtained cash in the market. The use of money has a well-known value. By the act of compulsorily requiring the citizen to deliver his goods the citizen is deprived of the use of the money and unless he is compensated immediately or is compensated for the loss of the use of the money, he does not receive the true measure of "just compensation."

The Congress intended to write into its statutes the substance and full measure of the right granted by the Fifth Amendment. The Government has no power to take except upon payment of just compensation. The Government is under a duty to pay just compensation in full. The Government has no right to pay less than just compensation.

The mandate is laid upon every department of the Government. The case is one of the rare ones in which it can be demonstrated mathematically that only one decision is possible without violating a plain right.

That plain right is, to be paid in full as of the date of taking. Any conclusion by which the citizen is forced to give up his property for public use and is obliged to receive less than just compensation involves a palpable wrong. To say that the citizen who is obliged to turn over his goods to Government and to whom Congress gives the right to sue in the District Court is entitled to true just compensation, but that the citizen who sues in the Court of Claims is not,

would make a laughing stock of the law. *Such an intent would be unconstitutional as in violation of the Fifth Amendment; and courts will construe statutes, if that is in any way possible, in such a sense that they will be constitutional rather than unconstitutional. The theory that Congress intended those suing in the District Court to obtain just compensation, but not those suing in the Court of Claims, must bear the heavy burden of every reasonable presumption against it; for, as was said in Linder v. U. S., 268 U. S. 5, 17, 18 (1925), "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." Cf. Lewellyn v. Frick, 268 U. S. 238, 251 (1925).*

The words of Section 177 of the Judicial Code have a proper legal meaning limited to interest *qua* interest. Compensation for detention may be measured by interest, but such compensation is in fact not the same as interest.

United States v. Rogers, 255 U. S. 163, 169 (1921);

Seaboard Air Line v. U. S., 261 U. S., 299, 306 (1923).

It is a fiction to say that the claim in such cases is based upon an implied contract. A fiction should never be permitted to work injustice: 25 C. J. 1086; *U. S. v. 1960 Bags of Coffee, 8 Cranch (U. S.), 398, 415 (1814).*

The fact is that no contractual relation exists between the Government and the citizen when the government says "Willy-nilly, you must hand over your property for government use."

The manner in which and the court in which the citizen's right to enforce the government's obligation

to pay just compensation may be asserted are matters *purely procedural*. It borders on the fantastic to suggest that a question of procedure as to whether one court of the United States or another court of the United States has jurisdiction can affect the substance of the right of just compensation. *In one court of the United States the citizen is entitled to the full measure of true just compensation; in another court of the United States he is not entitled to the full measure of just compensation!*

When payment is delayed the citizen can be given just compensation in no other way than by an allowance for the delay in payment.

Under the only true definition of just compensation, interest or its equivalent must be included as a part of just compensation itself. And there is no room to argue that Congress did not so intend.

The claim in the case at bar is for just compensation for material and just compensation for the delay in payment. At the dates of the taking claimant should have been paid just compensation, and the loss to which claimant has been subjected by the delay must be considered and allowed for at the rate of 6 per cent. per annum.

Section 177 of the Judicial Code does not forbid the payment of interest in this case. Congress has said that we are entitled to receive any amount sufficient to make up "just compensation." This court has said that that means "so much in addition" as "will produce the full equivalent of the value paid contemporaneously with the taking." Whether the "so much in addition" be called interest or not makes no difference. It is a part of just compensation. Section 177 is inapplicable, or, as to cases coming within their purview, is amended by the Acts of 1917.

CONCLUSION.

The Court below lost its way in a maze of inapplicable technicalities and ignored the larger implications. Had Congress the power to authorize the placing of an "obligatory" order? If Congress acted with power, are such orders really "obligatory," or was the assertion that they were obligatory a false pretense or an idle and impotent gesture? If the orders were obligatory, is it not circular and absurd reasoning to say that they could not be obligatory because they might be disobeyed? And then upon this unsound major premise to erect a theory of contract in the teeth of the facts and contrary to the actual intent?

It is important to save the Government's money. It is important that the Treasury should be protected from unjust claims. It is at least as important that the citizen should be protected in the full measure of his constitutional rights. It is most important that the full exercise of the war power should be unhindered by any ruling limiting useful agencies in making war. The power to place an obligatory order is a useful power of obvious expediency. To say that such an order was a request or an offer, not a command, is to strike at the heart of the whole system. Even in war time business men are charged with certain responsibilities to their dependents, and corporate managements are charged with responsibilities to their stockholders. If obligatory orders are obligatory and constitute a taking of property, such orders will be obeyed; otherwise, they will not. And the Government may be confronted by the alternative in war time of trying to socialize or communize or nationalize all the intricate business machinery of the country. Business men are not always successful in running their own businesses; the Government seldom is.

In many cases in which the citizens have responded to obligatory orders in the belief shared by all Gov-

ernment officials including the Department of Justice, that the orders were obligatory, the claimants are threatened with the loss of one-third or more of true just compensation, for, in some cases, the interest period will be eight or ten years, the interest equalling one-half or more of the principal of the claim. The business world and the legal profession will not soon forget the experiences of the last decade.

IRA JEWELL WILLIAMS,
JOHN H. STONE,
F. R. FORAKER,

Amici Curæ.

IRA JEWELL WILLIAMS, JR.,
CHARLES L. GUERIN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 362.—OCTOBER TERM, 1926.

Liggett & Myers Tobacco Company,	}	On Writ of Certiorari to the Court of Claims.
Petitioner,		
<i>vs.</i>		
The United States.		

[May 2, 1927.]

Mr. Justice BUTLER delivered the opinion of the Court.

Plaintiff brought this action to recover a balance claimed for tobacco products obtained from it for the Navy and Marine Corps between September 8, and November 23, 1918. The Court of Claims found the value to be \$483,504.30 and that in the same period the United States paid on account \$423,893.96, and gave judgment for the difference, \$59,610.34, without more. The plaintiff contends that the products were taken under the power of eminent domain and that it is entitled to such additional sum as will produce the equivalent of their value paid at the time of the taking; and that interest at a reasonable rate is the measure of the amount required to be added in order to make just compensation.

The sole question is whether the facts found constitute a taking by eminent domain. Plaintiff was engaged in the manufacture and sale of tobacco products. August 26, 1918, the Bureau of Supplies and Accounts of the Navy issued and delivered to it Navy order N-4128, stating that pursuant to the Act of March 4, 1917 (39 Stat. 1168, 1193) and the Act of June 15, 1917 (40 Stat. 182) and under the direction of the President an order thereby was placed to furnish specified tobacco products for which provisional prices were named; that compliance was obligatory; that no commercial orders should be allowed to interfere with the delivery called for; that, as it was impracticable then to "determine a reasonable and just compensation for the

material to be delivered, the fixing of the price will be subject to later determination. You are assured of a reasonable profit under this order; and as an advance payment you will be paid the unit prices stated hereon, with the understanding that such advance payment will not be considered as having any bearing upon the price to be subsequently fixed. Any difference between the amount of such advance payment and the amount finally determined upon as being just and reasonable will be paid to you or refunded by you, as the case may be." The document stated that the order must be accepted and filled in any event; that it was to be signed and returned by plaintiff; that deliveries were to be made as directed by a designated officer and bills sent to him bearing a certificate that the prices were those stated in the order; and that the conditions appearing on the reverse side of the order were made a part of it. These included printed portions of the above-mentioned Acts of Congress empowering the President in time of war to place an order with any person for war material, of a kind and quantity being produced by him, as the necessities of the Government might require; declaring that "compliance with all such orders shall be obligatory", and that, whenever the United States shall requisition any war material "it shall make just compensation therefor"; and authorizing the President to exercise this power through agencies to be determined by him. September 9, 1918, the Paymaster General of the Navy directed that any orders issued by the Quartermaster General of the Marine Corps should be executed and billed at the prices specified in order N-4128. And, October 14 and November 22 following, the order was further modified so as to call for additional tobacco products. Upon receipt of the order and each of the modifications plaintiff signed a statement thereon that it was "accepted subject to the conditions" specified. The President had authorized the Secretary of the Navy, either directly or through any officer who acting under the Secretary had authority to make contracts on behalf of the Government, to exercise all the power and authority vested in the President applicable to the production, purchase and requisitioning of war material.

Navy order N-4128 did not purport to be an offer to purchase; it commanded delivery of specified merchandise. Plaintiff's consent was not sought; it was not consulted as to quantity, price,

time or place of delivery. The Navy relied upon the compulsory provisions of the Acts of Congress and commanded compliance with the order. These Acts authorized the requisition of plaintiff's property for public use. The President was empowered to take immediate possession of its plant to manufacture the tobacco products called for. Act of June 3, 1916, 39 Stat. 166, 213. And it is to be presumed that the plant would have been taken if plaintiff had refused compliance. The acceptance was not the closing of a contract; it was the expression of purpose to obey. And the order was a continuing one and operated to require delivery of the specified articles whether then on hand or thereafter to be produced.

The findings show that plaintiff's property was taken by eminent domain; and its just compensation includes the additional amount claimed. *Seaboard Air Line Ry. v. United States*, 261 U. S. 299, 304; *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 123.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.